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Chair

Mr. Anthony Housefather

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● (1530)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good afternoon, colleagues. Good afternoon to our witnesses.

We are now going to resume our study of Bill C-75, an act to amend the Criminal Code, the Youth Criminal Justice Act and other acts.

It is a pleasure to welcome our witnesses for the first panel.

[*Translation*]

We're joined by counsel Yves Gratton, from Aide juridique de Montréal | Laval.

Welcome, Mr. Gratton.

Mr. Yves Gratton (Lawyer, Criminal Section, Aide juridique de Montréal, Laval): Thank you.

[*English*]

The Chair: From Pivot Legal Society, we have two attorneys from British Columbia, Naomi Moses and Caitlin Shane. Welcome to the committee. Because we try to hear the witnesses on video conference first, we're going to start with your testimony. Then we'll hear from Mr. Gratton, and then we're going to have questions.

Pivot, please go ahead.

Ms. Caitlin Shane (Lawyer, Pivot Legal Society): Good afternoon, honourable Chair and members of the committee. My name is Caitlin Shane, and I'm a lawyer with Pivot Legal Society. I'm joined today by Naomi Moses, who is a lawyer and one of Pivot's board members.

Pivot is a human rights and legal advocacy organization based out of Vancouver's Downtown Eastside. We take our mandate directly from our clients, who are sex workers, people who use drugs, people without homes, and people who by and large are living well below the poverty line.

On behalf of our clients today, we urge the committee to support the proposed amendments to the victim surcharge provisions. It is critical to return discretion to judges, who, under the current legislation, do not have the discretion to waive fines for defendants who cannot pay. We have some minor recommendations. I will leave that to Naomi to discuss shortly.

By way of background, when Pivot intervened before the Supreme Court of Canada in a decision that challenged the constitutionality of the victim fine surcharge, we made the argument that the mandatory surcharge amounted to cruel and unusual punishment. We explained what it means for poor defendants to appear before the court and have a fine imposed on them that they will not be able to pay. My hope today is to explain to the committee some of the harms that we explained to the court.

For the defendant who manages to pay the surcharge, it means having $100 less from the $335 that person earns on income assistance each month to pay for food, clothing, and basic necessities. For the defendant who doesn't pay, it means being subject to civil enforcement—and in B.C. the surcharge can be offset from social safety net funds, from bank accounts, and from wages. For the defendant who applies to extend the deadline for payment—a payment that this person may never be able to pay—it means engaging repeatedly in an application process that is lengthy, inaccessible and not supported by province-funded legal assistance.

For the defendant who defaults on payment, it means living in fear of the constant consequences of default, which can include arrest. It doesn't so much matter whether arrest is a likelihood. The Supreme Court of Canada has found, in relation to both sex workers and people who use drugs, that fear of arrest can lead to really dangerous consequences. It means being cut off from service providers. It means not calling police when there's an emergency and help is needed. It means isolation amidst housing and opioid crises.

We submit that the surcharge gives rise to the same scenario. It's still relevant. A person who lives in fear of imprisonment is subject to those same risks and will not necessarily rely on help when it's needed.

Judges across B.C. have recognized these harms and, despite common-law precedent, routinely sentence offenders to a day in jail in default of payment. While this practice may be alarming, it is not rooted in malice. We say it's rooted in mercy and in recognition of the fact that this defendant cannot pay. There are no other options for the defendant who cannot pay.

I'll close by saying that Parliament today has an important opportunity to remedy the harms created by the mandatory victim fine surcharge. We ask only that the provisions be made as accessible and as responsive to the needs of low-income communities as possible.

I'll turn it over to Naomi now, who can better explain those.

Thank you.

● (1535)

Naomi Moses (Lawyer, Pivot Legal Society): Good afternoon, honourable Chair and members of the committee. I am a lawyer at Rosenberg Kosakoski Litigation in Vancouver, and I appear today on behalf of Pivot Legal Society.

I echo my colleague's acknowledgement that this proposed legislation is an important step in ameliorating the reality that Pivot's clients, many of whom live in extreme poverty in the Downtown Eastside of Vancouver, have been very negatively impacted by the mandatory victim fine surcharge. We also have some concrete recommendations for improving these proposed amendments.

I'll focus my submissions on only one part of the proposed amendments, which is proposed new subsection 737(5). As it is currently drafted, this provision allows offenders to be exempted from payment of the victim fine surcharge, provided that they can establish, to the satisfaction of the court, that it would cause them undue hardship. The individual must apply to the court for an exemption.

We believe that the wording of subsection 5 should reflect what judges did in practice prior to the 2013 amendments to these provisions that made the victim fine surcharge mandatory. The general practice in provincial court was for a judge to exempt a person, often on a judge's own initiative, during sentencing, without a formal application, after the individual was given an opportunity to speak to their financial circumstances.

Removing the words in this provision, "an offender establishes to the satisfaction of the court that", and also "on application of the offender" would restore a judge's discretion to make these exemptions as needed, while retaining the presumption that a surcharge will be imposed.

A revision such as this one would ensure that the hardship exemption is accessible to people who need it the most. These are people living in poverty. They are generally unrepresented by counsel, and they are often convicted of relatively minor offences, for example, shoplifting groceries, breach of conditions, and failure to appear, all of which are very common criminal charges in the Downtown Eastside.

In addition, we urge the committee to consider how this bill might be expanded to waive the existing surcharges that have been imposed on people who cannot pay them. These are people who have already asked for extensions of time to pay, as this is the only relief currently granted under the existing legislation. We propose that this legislation be amended so that these surcharges are struck from the records of people living in poverty, who cannot pay them without seriously compromising their well-being, safety and survival.

Thank you for the opportunity to speak to the committee today. We welcome your questions.

The Chair: Thank you so much.

● (1540)

[*Translation*]

We'll give the floor to Mr. Gratton, from Aide juridique de Montréal | Laval

Mr. Yves Gratton: Good afternoon, everyone.

I won't repeat what the two lawyers from Pivot Legal Society just said. I also had the opportunity to hear their arguments before the Supreme Court.

Let me provide some background. One of my reasons for being here today is a case that I appealed in Quebec, Alex Boudreault v. Her Majesty the Queen, et al. The case concerned the judge's discretion regarding whether to impose a victim surcharge, a discretion that was removed by the Conservative Party in 2013. The case was heard by the Supreme Court in April 2018, and we're awaiting the verdict. Three Court of Appeal for Ontario cases were added to Mr. Boudreault's case, which I was defending and which came from the Court of Appeal of Quebec. Therefore, there were interveners from across Canada.

First, I would like to say that we aren't fixated on certain legal arguments. For example, we aren't claiming that the imposition of a victim surcharge violates section 12 of the Canadian Charter of Rights and Freedoms. Without going into that level of detail, we want to reassure people and tell them that, as representatives of the accused individuals, we aren't opposed to the principle of the victim surcharge. The surcharge exists for a reason and it's important in the Canadian criminal justice system. All interveners, prosecutors and counsel in Canada agree on that point.

However, we don't agree with the removal of the judge's discretion. We would like this discretion to be restored, for the reasons indicated by my two colleagues, among other reasons. One of the fundamental principles of the Criminal Code requires the judge to ask about the accused person's ability to pay before imposing a fine on the person. We believe and we respectfully argue that this reasoning should also apply to a victim surcharge. It must be understood that the victim surcharge applies not only to all cases, but also to all charges contained in an indictment or information.

I'll provide a simple example. In the case of five charges related to a criminal offence and for which the person receives a prison sentence, the victim surcharge will amount to $1,000. This could result in a disproportionate penalty, since the judges won't take into account the victim surcharge that must be imposed and that will be handled by the court registry. In addition, the offenders won't even pay the surcharge because they don't have any money.

If the offenders are sentenced to prison, some people may think that the offenders have the option of doing community service as punishment for their default of payment. However, in the provinces that allow community service, the time limit is two years. I don't have any evidence or solution, but to my knowledge, inmates can't do community service. If their prison sentence is three years, the only solution in their case would be to extend their incarceration, as mentioned by my colleagues. This is one of many examples in the case of a default of payment.

There may have been some laxness in Canadian trial courts before the removal of the judge's discretion in 2013. I agree that, in exercising their discretion, the judges may not have conducted the same type of investigation before imposing a victim surcharge as the one that they conducted before imposing a fine. Since 2013, counsel and courts have realized that they would be more rigorous in exercising the discretion if it were restored, since the imposition of a victim surcharge would no longer be automatic.

● (1545)

As I was saying, there may have been some laxness. Without questioning the importance of the victim surcharge, some chose not to impose it if, for example, the offender had just been sentenced to five years in prison. If the discretion is restored, the courts can and may need to ask certain questions about the appropriateness of a victim surcharge. I hope they do so, and I imagine that the defence counsel will be able to answer the questions properly.

Thank you.

The Chair: Thank you.

I appreciated hearing from all the witnesses.

We'll start the question period.

Mr. Cooper, the floor is yours.

[*English*]

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Mr. Chair.

Thank you to the witnesses.

As I understand it, in 2000 there was a change to the victim surcharge to provide judges with discretion in the case of undue hardship.

Monsieur Gratton, you indicated in your testimony that it is your belief that the judges will be a lot more judicious in applying the waiver of a victim surcharge in light of the fact that their discretion was taken away. I think it would be helpful, for the record, to understand, in part—and you did allude to it in your testimony—some of the figures that we saw.

In the province of New Brunswick, a report in 2008 indicated that the victim surcharge in two-thirds of some 62,000 cases had been waived. While judges were supposed to justify their decision for waiving the surcharge, this information was not included in 99% of 861 cases reviewed for that 2008 study in the province of New Brunswick. In light of, really, a consistent pattern of waiving the victim surcharge when, really, in many cases there was nothing other than the mere assertion of undue hardship involved, why should we have any confidence that this will not return to the same pattern that resulted in the previous Conservative government making that surcharge mandatory? It should be noted that there was a considerable cost in the form of funds for services and programs to support victims as a result of that waiver.

[*Translation*]

Mr. Yves Gratton: I understand your concerns. However, with all due respect, I don't think this angle is the best way to address the issue.

When I say the justice system should be trusted, I believe it. The interveners are aware of what they'll need to do in the future. When the judges' discretion was removed in 2013, all these issues and figures were presented to all the committees and during parliamentary debates. I listened to many of the debates, but we can make these figures say what we want them to say.

Of course, maybe some people should have paid a surcharge, but the surcharge was waived. Moreover, when a person pays the surcharge, it's questionable whether the entire amount actually goes to the criminal injuries compensation fund. I doubt it.

However, I don't think that's the right question to ask. Instead, the issue is whether the judges will know that they need to ask questions. I believe so, and I also believe that the judges will fulfill their obligations. In response to the statements made by the two lawyers who presented their arguments earlier, I would add that a court will find it quite simple to go through all the questions regarding a person's income. When people receive social assistance benefits, regardless of the province, they normally have nothing left after deducting the cost of rent and food.

I think that the judges will ask more of these types of questions to better inform their decisions. We must trust the justice system rather than force courts to impose victim surcharges.

● (1550)

[*English*]

Mr. Michael Cooper: Thank you for that.

Monsieur Gratton, Ms. Moses and Ms. Shane, I certainly heard your testimony respecting the victim surcharge. All of you are criminal lawyers. Do you have any comments on any other aspects of this bill or do you prefer to confine your remarks to the victim surcharge?

I certainly welcome any other comments that you have as practitioners about some of the positives or some of the other concerns that you may or may not have with Bill C-75.

[*Translation*]

Mr. Yves Gratton: Should I answer first? I think the question is for all three of us.

The Chair: The question is for all three of you. Mr. Cooper asked whether you have comments on the other provisions of the bill.

Mr. Gratton, do you want to answer quickly?

Mr. Yves Gratton: I'll answer the question, but first I would like a clarification. Are you asking whether we have comments on the other provisions of the bill concerning the recovery of the surcharge?

[*English*]

Mr. Michael Cooper: The short answer is yes. I'm asking if you have any other comments from your perspective as a practitioner.

[*Translation*]

Mr. Yves Gratton: I see.

The Supreme Court stated that an indigent person cannot be incarcerated for not having paid a fine or surcharge. In such cases, under section 734.7 of the Criminal Code, the offender must go before the judge and ask for an extension of the period given to pay the fine.

In Quebec, that period is 45 days. It's certainly covered by the Criminal Code. In practice, people are supposed to go back before the judge and ask for an additional period of two months. If they don't pay the fine, they go back two months later and ask for an additional two months. The judge cannot ask that an indigent person be incarcerated. That was the Supreme Court ruling, and judges respect that decision.

If the person goes before the judge and asks for more time, in theory, he or she will never go to jail. However, in practice people do not go before the judge, either because they are negligent, or because they are afraid, or do not know where to turn. Those who are homeless and have no income will not go before the judge. If the judge does not receive an extension request, he will issue a committal warrant. Can it be said that a warrant of committal meets the objective of the victim fine surcharge? With all due respect, the answer to that is no.

Canadian society will in the end have to pay for the additional incarceration, and the victim surcharge will never be paid. That is one of the consequences. In theory, the person can go before the judge and ask for more time to pay. This was also the decision of the Quebec Court of Appeal in the Chaussé case, and the court in fact said that defendants could ask for extensions for the rest of their lives. Indeed, people can ask for extensions, but who does so? No one.

There is also the matter of the suspension of drivers' licences or other licences because one has not paid a surcharge. One cannot ask for a pardon until the surcharge has been paid.

The law is also applied in civil matters, such as in the Boudreault case. That gentleman had been released and had been asked to post bail. He provided money to the court to meet that condition. When he committed further offences, he was again incarcerated. When Mr. Boudreault was convicted, the civil court clerk of the Montreal courthouse simply took some of the bail money to pay part of the surcharge. The person who had posted the money, his mother, lost her money because the court clerk took money from the bail money to pay the surcharge, since Mr. Boudreault was incarcerated and had not paid it.

● (1555)

The Chair: Thank you very much.

[*English*]

The time has expired.

Mr. Ehsassi.

Mr. Ali Ehsassi (Willowdale, Lib.): First of all, I'd like to thank the two witnesses who couldn't be here in person but are joining us from B.C.

I guess this is the best manner in which to do this, because this opportunity was taken away from you. As Mr. Cooper was saying, you were very persuasive on the victim fine surcharge and the harms that arise because of the system we've previously had. You're in favour of giving judges more discretion. Apart from that issue, is there any other aspect to this bill that is of interest to you and that you would like to comment on?

Ms. Caitlin Shane: For today, we'll be limiting our submissions to those around the victim fine surcharge.

I believe the committee will be hearing from Marie-Ève Sylvestre on some of the impacts of the bill with respect to sex workers as well as bail conditions. She's probably far better placed to speak to those, and her position on those issues would align with Pivot's as well.

Thank you.

Mr. Ali Ehsassi: For Monsieur Gratton, I have a question. You were talking about how there is a provision in the criminal court where you can't necessarily force indigent individuals to pay the surcharge.

You said a lot of people are unaware of it and they're not exactly sure how to take advantage of that provision. I assume it would fall to duty counsel to inform individuals. Is that not generally the person who guides individuals who perhaps cannot afford a lawyer? Would they not be their first line of defence, to inform individuals of their rights?

[*Translation*]

Mr. Yves Gratton: Yes, absolutely. In my opinion, the lawyer's role is not just to represent clients in court. I'm sure my fellow lawyers agree.

Our role is first to let the person know the amount of the surcharge, as that information is not provided at the hearing. Judges say "plus the surcharge", or "in addition to the surcharge", and the accused has no idea what the amount to be paid is. If he is free, we must direct him to the clerk of the criminal court so that he can obtain his documents. Once the accused has signed the surcharge papers regarding the fine he must pay within 45 days, I don't think I have the obligation to call him 45 days later to ask him if he paid it; he knows what he has to do.

However, as I was saying, our role can be as simple as saying that the person has no money to pay the surcharge and will not be paying it, and does not know where to go from there. On the form that indicates the amount to be paid, it does not say clearly that the person has to go to such or such a room before a given judge to ask for more time to pay. Homeless people will often misplace or lose their papers. To drug addicts, those papers can seem secondary. I'm not saying that that is an excuse for non-payment; I simply mean that the imposition of a surcharge may lead to complications unintended by the legislator. So I try to provide information as best I can, but there are limits to what I can do.

[*English*]

Mr. Ali Ehsassi: Absolutely.

Apart from the surcharge, is there any other aspect of this bill that you would like to comment on? All of your comments have focused on that.

[*Translation*]

Mr. Yves Gratton: No. In fact today I am focusing on section 737 of the Criminal Code.

Since I did not submit a brief, I invite you to read my briefs to the Supreme Court of Canada, which are public documents. I drafted a brief for leave to appeal, and a brief for the justices, which I invite you to consult.

All of the witnesses will primarily address the unintended consequences of the mandatory victim fine surcharge.

[*English*]

The Chair: Mr. Ehsassi, do you have anything else?

● (1600)

Mr. Ali Ehsassi: No, thank you.

The Chair: Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you, I'd like to thank all of the witnesses.

[*Translation*]

Thank you very much, Mr. Gratton.

[*English*]

I also particularly want to make a shout-out to Ms. Shane and Ms. Moses. I've visited Pivot on a couple of occasions and have seen the remarkable work you do for some of the most vulnerable people in Canada. I'm simply in awe of what you do. Thank you for what you do, and thank you for testifying here today.

I'd like to know a little bit more, though, about the nature of the case in which you intervened. You said that the primary argument was about cruel and unusual punishment for people who could not pay the fine, if I'm understanding you properly. The victim fine surcharge was simply impossible for them to address. I'm unclear about the point that one of you made about one day in jail in lieu of payment. I can't quite figure out how that connects. I'd appreciate if you'd speak to that.

I assume that you entirely support the amendments that are made in Bill C-75. However, you did say that you had some proposed changes at the outset. I'd like to know what those proposed amendments are, beyond simply supporting it.

Ms. Caitlin Shane: Certainly. I would note that Naomi's portion of the submissions did note a number of recommendations. If you'd like, Naomi could reiterate those.

Mr. Murray Rankin: I'd appreciate knowing them.

It's our job, of course, if we accept what you're suggesting, to try to reduce that to writing, to put that into legislative language, so any help you could provide would be appreciated.

Ms. Caitlin Shane: Certainly. Following Naomi's comments, I'll answer your question with respect to the day in jail.

And thank you for the compliment. It's appreciated.

Naomi Moses: Our proposed changes to proposed subsection 737(5) are simply to remove the language that right now says "an offender establishes to the satisfaction of the court that" and then the words "on application of the offender".

We see that as restoring the previous discretion judges had in practice—this is what they did in practice in provincial court—which was to speak with an offender at the conclusion of sentencing about the victim surcharge and to give the offender an opportunity to speak to their financial circumstances. We know that many of these individuals, particularly the clients Pivot serves, typically are unrepresented. They may not even have access to duty counsel. Because the victim surcharge occurs at the very end of sentencing, in practical terms it's very difficult for these individuals to make formal application to the court and then to satisfy the burden of establishing "to the satisfaction of the court" that undue hardship exists.

Mr. Murray Rankin: The effect of adding those changes would be to essentially codify the discretion that a judge would have in each and every case. That's the goal?

Naomi Moses: That's correct.

That's while retaining the presumption that the surcharge will be ordered, unless a judge exercises that discretion and the person before them provides some indication that undue hardship exists.

Mr. Murray Rankin: You take no issue with that presumption. You're okay with that.

Naomi Moses: Yes. Pivot absolutely supports the importance of victim services and the importance of funding those services properly. Many of the people Pivot serves find themselves before the court not just as defendants.

Mr. Murray Rankin: They're victims.

Naomi Moses: Some of them have been victims of crime. So this is an important presumption that exists in the code. We have no objection to the existence of the surcharge itself.

Mr. Murray Rankin: Ms. Shane, you were going to add something.

Ms. Caitlin Shane: You'd raised a question about the practice in B.C., which is commonplace, around sentencing an offender to a day in jail in default of payment. In our submissions as intervenors, we actually appended a list of over 100 cases in B.C. in which a sentencing judge ordered for a surcharge to be payable forthwith, and then, in default of payment, ordered that person to be sentenced to a day in jail.

I do want to be very clear that in raising this issue, I'm not in any way attempting to vilify B.C. judges. It's quite the opposite. We are acknowledging that this legislation as it stands puts B.C. judges in an untenable position where they are faced with a defendant who they know cannot pay and there are no other reasonable or proportionate means by which to sentence that person. It really is, as we called it in our factum, an act of mercy rather than malice.

● (1605)

Mr. Murray Rankin: I respect that you're saying that, and I understand the motivation, but if you're a drug user and you are in jail for a day, that could itself be very difficult for a person. Your point is that the judge has no discretion at present so that's the best you can do, and the B.C. judges have shown mercy. That will of course change with the amendments, if they go through, in Bill C-75.

Ms. Caitlin Shane: Absolutely. It's in recognition of all of those harms I outlined. In terms of balancing the different possibilities, that, unfortunately, is in some ways the least of all evils.

The Chair: Thank you.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Chair, I'll be handing over about a minute of my time to Mr. Sikand, if that's okay.

To the witnesses, thank you for your great testimony.

Ms. Shane and Ms. Moses, just taking a step back, what is the objective, in your opinion, of having a victim surcharge? Why is this in place at all?

Naomi Moses: The objective, as we see it, is to fund services for victims, and those are very important services that warrant funding. Our objection is not to the existence of the surcharge, or to the funding of those programs, but rather to the mandatory imposition of the surcharge on people who cannot pay it. It's simply an impossibility to ask someone who has only $335 a month from income assistance to pay a surcharge that in many cases represents two-thirds of their monthly income.

While the objective of the legislation is laudable, and we think that the objective is frequently served by people who are able to pay the surcharge, it is not served in the example of Pivot's clients and people who are similarly struggling for basic survival.

Ms. Iqra Khalid: Do you think that the legislative changes as they stand in Bill C-75 in some ways help in providing those services to victims? Is the money coming in?

Naomi Moses: We think that the money is coming in. We need to be cautious in talking about revenue and the way that revenue comes in, because we can't assume that all the surcharges that are imposed could ever be paid—it's simply not possible.

I note that in the last series of amendments in 2013, the amounts of the surcharges were doubled. Every person who is convicted of a crime is now paying twice what they were paying before. Even if many of those individuals cannot pay, the people who do pay are paying twice as much. In many provinces, they have seen increases, but again, it's very difficult to track exactly where that increase in revenue is coming from, whether it's a result of doubling or enforcement.

Ms. Iqra Khalid: From my understanding of your testimony, you want to make it fairer and not all-encompassing to those who are more vulnerable in the justice system. It would be unfair for them to have to pay these surcharges, and the judge should be allowed more discretion to be able to make that differentiation. Am I correct?

Naomi Moses: That's correct, yes.

The legislation as it's currently written offers no discretion whatsoever, so we are advocating simply for the restoration of that discretion.

Ms. Iqra Khalid: Thank you.

Mr. Gratton, do you have any input to the amendments to the current Bill C-75 as they've been proposed by Pivot?

● (1610)

[Translation]

Mr. Yves Gratton: No, I have absolutely nothing to add to my colleagues' statements.

However, I would like to clarify one point in connection with Mr. Rankin's question earlier; my colleague referred to the accused being incarcerated for one day in lieu of paying the fine. In Quebec, judges do not do that because the Quebec Court of Appeal deemed that illegal, and stated that they had to grant the province's statutory time period of 45 days. Judges cannot not grant that extension. Although I have not travelled there to verify this, I expect that the reason things are different in British Columbia is that a picture is worth a thousand words—judges see these indigent persons and realize that they will never pay the surcharge; so they prefer to impose a day's incarceration and close the file. I simply wanted to follow up on my colleague's example and give a more specific answer to Mr. Rankin's question.

To get back to your question, I have nothing to add, if not to say that I believe it is essential that we restore the judges' discretionary power, as proposed in Bill C-75.

[English]

The Chair: Mr. Sikand, if you're taking the rest, go ahead.

Mr. Gagan Sikand (Mississauga—Streetsville, Lib.): My question is also for Pivot.

I'm going to deviate, but based on your testimony, I wanted to ask if I could get your comment on the intersection of your clients with the court, more specifically, revictimization and how that affects those you represent.

Ms. Caitlin Shane: Certainly. It's somewhat ironic, the fact that we're talking about a victim fine surcharge designed to provide funding and protection to victims of crime, and so often our clients, and other low-income folks across Canada, who are engaged in oftentimes petty crimes, breaches of bail conditions, simple possession of illicit substances.... I don't mean in any way to belittle or, quite frankly, victimize those people—because they are incredibly strong and resilient—but this type of legislation, in which a judge cannot take into account the lived reality of a person before them, is in and of itself victimizing.

Certainly, the sort of laundry list of possible outcomes that I discussed, whether it's individuals giving up a third or two-thirds of their paltry income assistance or a person living in constant fear of arrest, is a picture of the law being used to victimize people further. Again, we really do push for the discretion of judges to account for what people are experiencing on a daily basis. These are folks who are criminalized by their very existence.

The Chair: Thank you so much.

Mr. Rankin asked for a bit of time to ask a small supplementary question.

[Translation]

Mr. Murray Rankin: I just have a brief question for Mr. Gratton, for a clarification. I'd like to know more about the Boudreault case.

What were the main arguments? Were they mostly based on the concept of cruel and unusual punishment? Was that the crux, or were there other arguments?

Mr. Yves Gratton: Yes, mostly. Because the legislator had removed the discretionary power to impose the surcharge or waive it, some situations could generate disproportionate sanctions that amounted to cruel and unusual punishment, which breached section 12 of the Canadian Charter of Rights and Freedoms. In summary, that was the gist of it.

The Chair: I'd like to thank Mr. Gratton.

[*English*]

I'd like to thank both of you from Pivot. It's so appreciated. Your testimony was very helpful. I know it's hard by video conference—you can't see the people in the room, you can't see their reaction—but again, I thank you for what your organization does. It's much appreciated.

[*Translation*]

Mr. Gratton, we really appreciated your testimony.

[*English*]

I'd like to call a brief recess.

I'll ask the members of the next panel to come up, because I'd like to start it a bit early, if possible. We have a vote, and we have to get out at 5:30. I want to make sure we hear your testimony in its entirety.

● (1615)

(Pause)

● (1620)

The Chair: It is a great pleasure to reconvene this meeting, as we are now going to hear from our second panel on Bill C-75.

I would like to welcome our esteemed group of witnesses for this panel.

We start with Mr. Steve Coughlan, who is a professor at the Schulich School of Law at Dalhousie University. As representatives of gay and lesbian historians, we have Mr. Tom Hooper, who is faculty at the law and society program at York University, and Prof. Gary Kinsman, who is professor emeritus of sociology at Laurentian University. From the Canadian Centre for Gender and Sexual Diversity, we have Ms. Calla Barnett, who is the board president.

We also have with us Prof. Robert Leckey, from Egale Canada Human Rights Trust. Mr. Leckey has just joined us. He is a law professor at McGill University, and is in fact the dean at McGill's faculty of law and a past president of Egale Canada.

Welcome, all.

As I was telling the other panellists, we always go with the video conference folks first because if we lose you, we don't want to lose your statement. I know you just walked into the studio, but if you're ready, I'll start with you. You have eight minutes, but I won't cut you off before 10 minutes.

The floor is yours, Dean Leckey.

Professor Robert Leckey (Law Professor, McGill University, and Past-President, Egale Canada, Egale Canada Human Rights Trust): Thank you very much. Signal if I'm going too fast at any point.

Our LGBTQI2S communities are appreciative of the interest shown us by the federal government in a whole range of ways, reaching right up to the Prime Minister.

In my time this afternoon, I intend to make four points. First, I will articulate our general perspective or approach. Second, I will express Egale Canada's agreement with the submission by Gentile, Hooper, Kinsman, and Maynard, whom you'll be hearing from, it turns out, after me.

I want to call for legislative change in two respects. The first is the failure in Bill C-75 to address the problem of surgeries on intersex children, and the second is a problem with the otherwise welcome efforts to undo past discrimination against our communities.

Let me start, briefly, with the overall perspective.

At Egale Canada, we come at these issues from a general approach attuned to LGBTQI2S equality, dignity and inclusion. Fundamentally, we are keenly conscious of the long history of the criminal law's sexual and moral offences being applied against our communities discriminatorily, discretionarily and disproportionately. We would emphasize intersectionality, conscious that members of our community experience overlapping disadvantage by virtue of being queer people with disabilities, for example, or being racialized or indigenous transpeople. I would emphasize the symbolic significance of the criminal law on matters touching our communities.

The Victorian prohibitions relating to sodomy, bawdy houses, indecency—you name it—have consequences beyond their enforcement and convictions obtained. The mere threat of their enforcement can operate powerfully, and it operates more powerfully against those most vulnerable people who might not get good legal advice or have any idea how to respond.

Second, very briefly, I wanted to signal that we fully endorse the report from Kinsman et al., whom you're about to hear from. We support their calls for Bill C-75 to go further than it does, in a number of ways. We affirm their call for adopting clear, evidence-based guidelines on the use of criminal law in prosecuting cases of HIV non-disclosure.

Let me turn now to the two legislative changes that it is possible nobody else will raise with you.

The first concerns intersex children. Subsection 268(1) of the Criminal Code sets out the crime of aggravated assault, and subsection 268(3) addresses excision. It specifies that "wounds" or "maims" includes cutting a person's "labia majora, labia minora or clitoris", but then it provides an exception, where surgery is performed "for the purpose of that person having normal reproductive functions or normal sexual appearance or function". The alternative basis for the exemption from aggravated assault's application is when a person is at least 18 years of age.

In other words, paragraph 268(3)(a) deflects the protections of the criminal law from children on whom surgery is inflicted for the purpose of giving them a "normal sexual appearance or function". The idea of a "normal sexual appearance or function" is a vehicle for cisnormative assumptions about which bodies are medically correct or normal.

I can't undertake a full charter analysis this afternoon, but subsection 268(3) raises concerns about security of the person and equality. Moreover, international human rights bodies have recognized that so-called corrective surgery of children whose genitals are characterized as abnormal violates their personal autonomy and integrity. We urge you to amend Bill C-75 to modify subsection 268 (3).

The final point concerns legislation with a view to ending historical discrimination.

Two corrective efforts—proposed section 156 in Bill C-75 and the expungement mechanism in Bill C-66, already passed—rely unjustly and discriminatorily on today's age of sexual consent.

First, proposed section 156 preserves the possibility of prosecution for wrongful conduct where the offences, once in place, have been repealed, so long as the conduct remains criminal today.

● (1625)

Second, paragraph 25(c) of Bill C-66 provides for applications for expungement orders for convictions in respect of listed same-sex offences on certain conditions, including that the persons participating in the activity were 16 years of age or older at the time.

Both provisions aim to end the harmful effects of criminalizing same-sex conduct in a discriminatory way, while preserving the power to punish conduct that remains plainly criminal by today's standards. But both are problematic. Efforts to assure equal treatment must not rely, as these do, on the current age of consent of 16. Instead, it is necessary to take into account the fact that, while the age of consent for sodomy was for a time 21, and then 18, the age of consent for different-sex sex was 14 until the year 2008.

Proposed section 156 would still allow the prosecution for consensual sodomy committed with a 14- or 15-year-old, because today, someone that age cannot consent to sex except with a person close in age to them. The expungement provision, for its part, would not permit the expungement of a sodomy conviction for consensual sodomy carried out with a 14- or 15-year-old. Whatever the good intentions, these provisions unintentionally perpetuate discrimination against our communities, insofar as there is no basis for prosecuting a heterosexual who had consensual vaginal intercourse with a 14- or 15-year-old while the age of consent was 14.

Accordingly, Justice Canada's charter statement is incorrect when it states that "the enactment of proposed section 156 would limit any such prosecutions to those that do not raise Charter concerns."

Thanks for your attention.

● (1630)

The Chair: Thank you very much.

We will now move to Mr. Coughlan.

Professor Steve Coughlan (Professor, Schulich School of Law, Dalhousie University, As an Individual): Thank you very much.

I'm pleased to have been invited to speak with you today about the portions of Bill C-75 that deal with removing the outdated provisions in the Criminal Code, specifically those that have actually been struck down by courts, as opposed to simply being out of step with the times.

This is an issue that I've been concerned with for decades and about which I've been advocating with the Department of Justice for several years now. We do seem to be on the verge of action being taken, finally, long overdue action. I am, of course, in favour of that. Indeed, it's difficult to imagine any basis upon which anyone could be opposed to doing this.

In September 2016, a trial judge in Alberta, as all of you will know, convicted Travis Vader of murder, relying on the offence set out in section 230 of the Criminal Code. Of course, section 230 of the Criminal Code is part of the constructive murder provisions and it was struck down by the Supreme Court of Canada 25 years ago. Unfortunately, despite its presence in the Criminal Code, it's not part of the criminal law of Canada.

This was exactly one of the flaws in the Criminal Code that a large group of criminal law academics pointed out to the Minister of Justice in a letter in December 2015. It was the same failure to update the code to remove constructive murder that led the British Columbia Court of Appeal to observe, in a 2010 decision:

> I cannot leave these reasons without wondering why steps have not been taken to amend the Criminal Code to conform to the now 20-year-old decision of the Supreme Court of Canada in Martineau determining that language in s. 229(c) is unconstitutional. The law that is recorded in the statute, on which every citizen is entitled to rely, is not the law of the land. An issue such as arose in this case should not occur. It creates the risk of a miscarriage of justice and the potential need to incur significant costs addressing an error in an appellate court with the possible costs of a new trial, assuming one is practical. In my view, failure to deal appropriately with such matters by updating the Criminal Code to remove provisions that have been found to offend the Constitution is not in the interests of justice.

As I say, that's a 2010 decision called Townsend. They reached that conclusion by citing other judgments in which exactly the same thing had happened, ranging from 1997 on to 2008, in which juries had been told that the law around murder was what was set out in the Criminal Code, when of course, it's not. That seems like a glaringly obvious point but it's worth stressing it.

Section 19 of the Criminal Code says that ignorance of the law is no excuse. We rely on the fiction that every member of the public actually knows the law, but that's really only justifiable if it's possible for a person to find out the law. One of the key principles of fundamental justice, guaranteed by section 7 of the charter, is the principle of legality, the notion that the law must be knowable. It's why we have the strict construction rule of statutory interpretation. It's why section 9 of the Criminal Code abolished common law crime. It's the reason that laws can be struck down for being vague. If it's not clear enough what the law is, we say, then the law is unconstitutional.

We have all sorts of fundamental and important rules insisting on the language of the Criminal Code being as clear as it can possibly be, and yet, in that context, we have provisions that unambiguously state as the law what is unambiguously not the law, and we allow that to continue for decades. That is, frankly, dumbfounding.

The trial judge in the Vader case received a certain amount of criticism. At some level, that's understandable. We expect judges to know the law more than ordinary people do, but the general public doesn't have access to an annotated Criminal Code. The general public will go online. They're going to go to the Department of Justice's website, the official Government of Canada website, and they will look up the Criminal Code and it will lie to them about what the law is.

Of course, it's not just the general public; it's the police. The police should be able to look at a statute that actually reflects the law of Canada. When that's not the case, then of course we get the situation that we have faced in Canada, with dozens of people criminally charged with an offence that does not exist—the prohibition on anal intercourse in section 159.

Of course such charges are eventually thrown out, but that's of very little solace to the person who has been caused the embarrassment and expense of going through that procedure. We can say, "Well, you know, the police should have known better than to believe that the criminal law was what the Criminal Code said it was," but that hardly seems like an answer.

Let's think again about the blame given to the judge in the Vader case, in not knowing that section 230 had been struck down. Okay, yes, he should have known.

On the other hand, all it means is that he failed to evade a trap that had been set for him. Surely a legitimate question to ask is why we are setting traps for our judges. If someone falls because they don't notice that their shoelaces have been tied together, a lot of the blame has to go to the person who tied the shoelaces together. If a judge doesn't notice a trap, which was set in the law, a good part of the blame has to go to the person who set the trap. In this case, that's Parliament. It's you. There is no good reason that this situation should have been allowed to continue for decades, but Parliament has allowed it to do so.

How much work would it have taken to avoid the pitfall that arose in the Vader case and the ones that can potentially arise from the other unconstitutional provisions? Realistically, a summer student in the Department of Justice, spending two hours some afternoon, could have headed this off. It's hard to see how the drafting or passing of such a bill could have occupied any real legislative time since the Supreme Court of Canada has already done all of the policy work of deciding that the provisions are unconstitutional.

Now it's fair to respond that not every situation is the same. When the constructive murder provisions were struck down, it was clear that nothing needed to be put in their place. When loitering, in paragraph 179(1)(b) was struck down, the Supreme Court provided some guidance as to what a constitutional law would look like, so you would have needed a bit of time to draft a new bill that was constitutional. When the abortion provisions were struck down in 1988, the Supreme Court didn't actually say that no abortion provisions could exist, just that these ones were no good, so yes, some time might have been needed to decide whether we would do something else instead, and if so, what.

The key point to note here, though, is that it only means that the second step might vary. The first step, invariably, is unchanging and utterly non-discretionary. The existing law is no law, and it has to be removed from the Criminal Code. Whatever might happen after that, there is no reason not to do that in the short term.

This leads, I have to say, to my major concern here today. As I've said, there is no conceivable reason, finally, after decades, no to remove these unconstitutional provisions from the Criminal Code. We nonetheless seem to be faced with the real possibility that this Parliament will not do it.

The provisions dealing with the removal of unconstitutional provisions used to be in their own bill. It used to be Bill C-39. For some reason, that bill, which contained nothing else and had no real possibility of attracting any controversy, and those sensible and uncontentious provisions have now been placed in Bill C-75, which contains many sensible and many contentious provisions.

Personally, I think some of those other proposals are very good, and some, I think, have just not been thought through, so it's difficult to actually tell whether they are wise or unwise. This bill needs to be thoroughly debated and passed through both Houses with barely a year left until the next election. It won't be surprising if that doesn't happen.

That means that we're faced here with the choice between rushing through potentially far-reaching reforms without adequate consideration as the price for solving a long-standing and fundamental problem, or allowing that long-standing and fundamental problem to continue as the price for not creating further and bigger ones. That's not an easy choice, and it is not in the least apparent as to why we should have been forced to it, or why Bill C-39 couldn't have been proceeded with on its own.

Ultimately, I do commend to you the portions of Bill C-75 that do the sensible thing of removing these unconstitutional provisions, and I hope there is some fashion in which that can happen, whether the rest of this bill goes forward or not.

Thank you.

● (1635)

The Chair: Thank you very much.

Now we'll have Mr. Hooper and Mr. Kinsman.

Professor Tom Hooper (Contract Faculty, Law and Society Program, York University, As an Individual): Thank you for inviting us to speak here today. I'll be sharing my time with Professor Kinsman.

We're here representing a group of gay and lesbian historians, with expertise in the policing of queer sexualities. We're here to follow up on the 10th report of the Senate human rights committee, which called on this government to address archaic laws used to criminalize LGBTQ2 people in Canada. I really mean archaic: indecent acts, vagrancy, bawdy houses. This is like the *Antiques Roadshow* of the Criminal Code.

Bill C-75 repeals section 159, anal intercourse, and this is an important part of thePrime Minister's recent apology to LGBTQ2 people, in which he specifically referenced the criminal provision against buggery and the harm caused by it. Acknowledging this harm, the government passed Bill C-66, which allows those convicted of this offence to apply to have their records expunged under certain conditions.

The repeal of anal intercourse is part of the larger effort to eliminate what has been labelled "zombie" laws. These laws are still on the books despite court rulings specifically declaring them unconstitutional. The Prime Minister also apologized to those arrested in the bathhouse raids, and he specifically referenced the injustice caused by the bawdy house law, but this was excluded both from Bill C-66 and the bill before us today. This is because the bawdy house law does not precisely fit the government's narrow definition of a zombie law. It has not explicitly been declared unconstitutional by the courts. It's not a zombie law. It's a different kind of monster. It's a Frankenstein law.

Why am I using this broad cultural reference to Frankenstein to describe the bawdy house law? Well, I'm going to give you three reasons.

First, like Frankenstein, the bawdy house law is a 19th-century relic. It was included in the original 1892 Criminal Code as a prohibition against brothels and other spaces of sex work. It was amended in 1917 to include places of indecency, in an effort to close massage parlours. This law is anachronistic and it must be repealed.

The second reason I am calling this a Frankenstein law is that like Frankenstein's monster, the bawdy house law is known to cause harm. In the 2013 Bedford decision, the Supreme Court found the bawdy house law to cause harm to sex workers that is grossly disproportionate to the objectives of the law. As a result, the reference to prostitution was removed from the bawdy house law under the Protection of Communities and Exploited Persons Act in 2015, PCEPA.

PCEPA maintained many unjust laws, including the bawdy house law and its reference to indecency, which was used by police to raid bathhouses. From 1968 to 2004, more than 1,300 men were charged in bathhouse raids all under this law. You heard last week how this caused harm to gay men like Ron Rosenes, a member of the Order of Canada who to this day has a police record from being charged in the 1981 Toronto bath house raids.

The government has specifically apologized for this unjust law. Why do we need to be here to ask for its repeal? Men like Ron Rosenes deserve to have their records cleared.

The third reason I'm calling this a Frankenstein law is that like Frankenstein's monster, the bawdy house law does not resemble the intention of its creator. This law was created by Parliament to criminalize brothels and other sexual spaces based on a community standard of morality.

The 2013 Bedford decision led to the removal of sex work from this law. This left behind the vague concept of indecency, which was significantly altered by the Supreme Court in the 2005 Labaye case. In that decision, the law was not declared unconstitutional; instead, it was rewritten by the court. The definition of indecency was changed from a community standard of morality to a standard based on non-consensual harm.

This new definition of a bawdy house is a very serious offence and is totally unrecognizable from what Parliament intended. What was once a morality law against brothels has turned into a heinous, violent crime. What type of establishment would allow such acts of non-consensual harm? Is a 19th-century morality law the best tool to combat such places?

Such acts are covered under other more appropriate sections of the Criminal Code. It's strange that clause 75 of Bill C-75 amends the bawdy house law to allow the possibility of summary conviction, a lesser penalty. This is inconsistent with the gravity of this offence as the courts have defined it now.

● (1640)

In 1982, then minister of justice Jean Chrétien said to this committee, "As a matter of principle, I believe that if sections of the Criminal Code have fallen into disuse or become obsolete, there was no reason to maintain them." There were zero charges under the bawdy house law in 2017. Parliament does not need to wait for the courts to repeal this outdated law, especially a law that the Prime Minister has apologized for.

I urge this committee to not only repeal the zombie laws, but also the Frankenstein laws, and all other laws crafted in 19th-century morality that have criminalized LGBTQ2 people and sex workers.

Thank you.

● (1645)

Professor Gary Kinsman (Professor Emeritus of Sociology, Laurentian University, As an Individual): Thanks, Tom.

Also, thanks to Dean Leckey for the support from McGill for the position that we are putting forward today before this committee.

The act of indecency section of the bawdy house law is linked to a broader legal construction of same-gender sex as indecent in Canadian history. This is also the case with the indecent acts offence. These sections have been and continue to be used to define LGBTQ2S practices as more indecent than similar heterosexual activities, mobilizing discriminatory practices against our communities.

In this presentation, I'm drawing on extensive research and writing that I've done, along with other members of our group, on the regulation and policing of consensual sexual activities in Canada. Since the late 19th century, the offence of indecent acts has been used to arrest LGBTQ2S people in bars, clubs, parks and washrooms. In these situations, the individuals involved have constructed relations of privacy and intimacy for themselves, hidden from view behind trees or bushes, and in cubicles with locked or closed doors, and have not been trying to bother other people. Often they have been entrapped by the police invading their privacy.

Police often used indecent acts instead of gross indecency or buggery charges because it was a lesser offence, and it was easier to prove in court. In the national security purge campaign, which the Prime Minister apologized for against LGBTQ2S people, indecent act was the charge that the RCMP threatened to use to get gay and bisexual men to give up the names of their friends in the public service and the military, so that the police could then purge those individuals.

In Ontario, following the mass resistance to the bath raids in the early 1980s, the police used targeted surveillance, including the use of video surveillance equipment, for indecent act arrests. These occurred in St. Catharines, Welland, Oakville, Oshawa, Mississauga, Guelph, Kitchener-Waterloo, and at the Orillia Opera House. The names of those charged were released by the police to the newspapers, leading a man in St. Catharines to kill himself.

According to the Right to Privacy Committee, 369 men in Toronto were arrested for indecent acts with other men just between July 1982 and April 1983. Thousands of people were unjustly arrested under the indecent acts offence.

Section 60 of Bill C-75 amends parts of the indecent acts provision. This provision must be entirely repealed. This would also allow those unjustly convicted under indecent acts to apply for expungement of their conviction, which they are currently denied under Bill C-66. It is not listed in that bill, and it is still on the books. This committee can actually make an effort to deal with this historically unjust offence.

Vagrancy is also a broad, ill-defined offence. It has historically been used against sex workers, but also to police people's genders and sexual expressions. Those viewed as wearing the clothes and/or otherwise engaging in the self-presentation of the "wrong" gender were charged under this offence. In a 1994 Supreme Court case, vagrancy was declared unconstitutional, and contrary to the charter. Clause 62 of Bill C-75 removes part of the vagrancy law, but like bawdy houses and indecent acts, the offence otherwise remains intact. It must be entirely repealed.

The targeted use of morality provisions and police entrapment have created historical links and ties between the struggles of LGBTQ2S communities and sex workers. We fully support the position that was presented to you by the Canadian Alliance for Sex Work Law Reform.

In 2015, the justice minister declared, "I definitely am committed to reviewing the prostitution laws". Three years later, it is past time to act. In the broader context of repealing laws criminalizing sex work, we join the call for the repeal of the material benefits and advertising offences, which create unsafe working and living conditions for sex workers and puts sex workers at risk.

There are many other laws that have been used to criminalize the consensual activities of LGBTQ2S people that must be addressed, but are not mentioned in Bill C-75. We certainly hope they will be acted upon soon. These include obscenity laws that have been used against LGBT bookstores and publications and to construct non-conforming sexual representations as more obscene and indecent than similar heterosexual ones.

We also fully support the concerns that the Canadian AIDS/HIV Legal Network and many others have raised regarding the sections of the Criminal Code being used to unjustly criminalize those living with HIV.

● (1650)

In conclusion, we urge you to end the reliance of the Criminal Code on enforcing morality. This is done through various sections that define our sexualities as indecent and criminal. Instead, criminal offenses should be directed where they really need to be, which is on actual violence and actual harassment.

The apology process to our communities demands that the bawdy house laws and indecent act and vagrancy provisions are entirely repealed in Bill C-75. Otherwise, that apology remains flawed and unfulfilled. You have the opportunity to fix this now. We hope you will take it.

Thanks.

The Chair: Thank you very much.

Ms. Barnett.

Ms. Calla Barnett (Board President, Canadian Centre for Gender and Sexual Diversity): Thank you.

I appreciate the space that's being provided to me and to the centre today to have our voices heard and to speak for those who cannot. I'm here for them, for me and for all Canadians who value justice and equality. We're here in solidarity with the LGBT historians, and we fully support the points raised by Egale and Mr. Leckey.

Before I begin, I would like to acknowledge that these proceedings are taking place on unceded Algonquin territory.

As indicated by my colleagues today and last week, Bill C-75 is a wonderful opportunity for us to honour the apology made by the Prime Minister and address the continued criminalization of the LGBTQ2SIA community and the lack of bodily autonomy experienced by members of our community.

That said, before I make my critiques and recommendations, I would like to offer my commendation for the inclusion of the repeal of anal intercourse as a crime. This repeal is a step forward, and the change is long overdue. Thank you.

However, if we stop at this issue, this bill will become a lost opportunity for so many other overdue changes that would bring justice and equality to the LGBTQ2SIA community and all Canadians. We are everyone and we are everywhere.

The lack of repeal of the bawdy house law and vagrancy, nudity, immoral theatrical performance and indecent exhibition laws remains a serious point of contention between our community and the government. The apology delivered last year by the Prime Minister explicitly refers to the use of the bawdy house law to criminalize the LGBTQ2SIA community; however, no action has been taken on this issue.

The effects of these laws continue to cause harm in our communities. The people who have been charged and convicted under them have lost their families, their loved ones and their careers. They live in precarious situations. Some have taken their lives. Those who are still with us cannot have the records erased until this law is repealed. They continue to live with the shame of such treatment, as some have for over 30 years. This state-caused harm has been acknowledged by the Prime Minister himself and yet continues to be put aside.

The criminalization of sex work has been ruled unconstitutional by the Supreme Court, specifically in the 2013 Bedford case. Unfortunately, the PCEPA reconstituted a number of those crimes deemed unconstitutional, including communicating, obtaining sexual services for consideration, material benefit from sexual services and procuring, and advertising and material benefit in advertising, which work together to isolate sex workers. They cannot screen clients or hire security or administrative support. Such laws continue to put sex workers in danger.

Local, provincial and federal police services continue to use the existing legislation to harass and criminalize folks who should be allowed to do their jobs with the support and protection of the state. We strongly recommend that a clear decriminalization of sex work be included in Bill C-75.

Bill C-75 fails to protect intersex children from non-consensual surgery. In June 2017 the CCGSD came out with our "Pink Agenda", making it clear that we stand in solidarity with intersex communities and their right to decide what is best for their bodies, yet today subsection 268(3) of the Criminal Code of Canada allows non-consensual surgery by medical professionals to alter the bodies of infants and children whom they perceive to be ambiguous, that is, intersex.

In doing so, the bodily autonomy of those infants is removed by the state, the parents and the medical practitioners who make these decisions and perform these surgeries. This causes undue harm because of their own discomfort. For example, Kimberly Mascott Zieselman, who published an opinion piece in USA Today in 2017, had her testes removed without her consent when she was 15. This surgery led her to take hormone replacements for the rest of her life.

She was not even informed that she had had this surgery until she was 41 years old. Imagine finding out that part of your body had been removed without your consent. Imagine that it led to a continuing medical condition and medical expense for the rest of your life. That's what we allow with this law. We strongly recommend that the repeal of subsection 268(3) be included in Bill C-75.

Bill C-75 fails to limit the laws that allow the criminalization of HIV. We have been asking for clarity on this. To this day, and regardless of the government's own report, the criminal justice system's response to the non-disclosure of HIV, which states that HIV transmission is a public health issue instead of a criminal issue, is that the non-disclosure of HIV is treated as an aggravated sexual assault in the criminal justice system.

● (1655)

In that same report, it is demonstrated that sexual activity with a person living with HIV who is taking treatment as prescribed and has maintained a suppressed viral load "poses a negligible risk of transmission." The continued ability to criminalize the non-disclosure of HIV is in direct opposition to the government's own evidence-based report.

Bill C-75 can be used to limit this law. It can be used to ensure that non-disclosure of HIV is not criminalized and that members of the LGBTQ2SIA are not discriminated against by homophobic, transphobic or otherwise rogue Crown attorneys. However, as it is written, it does not.

My last point is that Bill C-75 fails to properly define "marginalized person". While C-75 would require judges to consider the circumstances of an accused person from a marginalized group when deciding on bail conditions, the lack of definition of "marginalized persons" can be interpreted to exclude the LGBTQ2SIA community. We strongly recommend the explicit inclusion of LGBTQ2SIA in the definition of "marginalized persons" in C-75.

Thank you very much for listening.

The Chair: Thank you very much for your testimony. I appreciate it because a lot of the issues raised by this panel are new and have not been raised by previous witnesses. That's very much appreciated.

We'll go to the first round of questions.

Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair.

Professor Coughlan, I appreciate your submission with respect to zombie laws. You mentioned the case of Travis Vader, who murdered Lyle and Marie McCann, an elderly couple from my home community of St. Albert. Following Justice Thomas's decision and under the leadership of our chair, this committee wrote a letter to the Minister of Justice calling on the government to introduce legislation to repeal "zombie" sections of the Criminal Code. Bret McCann, the son of Lyle and Marie McCann, approached me shortly thereafter, and he and I had a press conference, along with his wife Mary-Ann in St. Albert in December 2016.

You're quite right. In March 2017, the Minister of Justice did introduce Bill C-39, and then it sat at first reading. Nothing went forward. I asked the minister repeatedly about the reason for the delay on a matter that is not controversial. As you pointed out, there is no conceivable reason for unconstitutional sections of the Criminal Code to remain in the Criminal Code, in black and white, purporting to be the law. As a result, we're now faced with this situation. A very straightforward bill, which could have been passed with unanimity, is now tied to a massive omnibus bill.

I am in touch with the McCann family, and they are quite distressed. They have spoken out in deep frustration over this government's inability to get it done.

I should note—you mentioned section 159 of the Criminal Code respecting anal intercourse. Similar to the way the government handled section 230, they introduced a stand-alone bill, Bill C-32, back in the fall of 2016. They made a big fuss about it, but it was such a priority for the government that it remained stuck at first reading. No action was taken on it. They then reintroduced the repeal of section 159 with the introduction of C-39 on March 8, 2017. Again, it was such a priority that it's stuck at first reading. Now we have Bill C-75.

You are quite right when you note that it's not just this government. Previous governments didn't repeal unconstitutional sections. Going forward, if we can get these sections repealed, what do you suggest should occur to prevent this from happening again? Presumably this bill will pass and these sections will be removed, but inevitably there will be new sections dubbed unconstitutional. What steps should Parliament take to be proactive going forward?

● (1700)

Prof. Steve Coughlan: I would note two things in that.

One is that it is worth observing that although the things that Bill C-39 would have done are duplicated in Bill C-75, Bill C-39 still exists. There is actually no reason that Bill C-39 couldn't be proceeded with, even if Bill C-75 is not.

On the go-forward basis, though, it seems to me that there's no good reason that the Department of Justice couldn't, every two years, have the charter cleanup bill. Year 2018 is what Bill C-75 will be, but why not the charter cleanup bill 2020, the charter cleanup bill 2022? It's just tiny little housekeeping tasks and, like any other housekeeping, you keep on top of it a little at a time and it doesn't become overwhelming.

It probably doesn't need to be done annually. It's not as though charter challenges are successful as often as that, but if biennially the Department of Justice simply looked at whether there are any of these basic administrative tasks that need to be done to the Criminal Code—and did that every two years—we'd stay on top of this.

Mr. Michael Cooper: As we saw in the case of Travis Vader, the consequences of inaction are real. This is not some abstract academic issue. The McCann family waited six years for justice. Just as they thought that justice had finally arrived when Travis Vader was convicted of two counts of second-degree murder, literally that afternoon, they found out that there may be a problem with that verdict.

A few years earlier, it's my understanding that there was a case in British Columbia involving murder, in which the trial judge left a copy of a zombie section of the Criminal Code with the jury in the trial, and it was appealed to the British Columbia Court of Appeal. The murder conviction was not overturned. It was upheld only on the basis of the trial judge's impeccable instructions to the jury.

What regard to what happened in the case of Justice Denny Thomas misapplying section 230, it was not the first time that this has happened.

Prof. Steve Coughlan: By no means no, and I think the case you're referring to is Townsend.

At least three times that I know of, at the end of a murder trial, juries have gone off to deliberate, and they've made the perfectly reasonable request that they have a copy of the portions of the Criminal Code that are relevant. Someone has made the perfectly reasonable decision that they'll give them a copy of the Criminal Code provision. It has never occurred to them that the Criminal Code provision was unconstitutional and wasn't the law.

It's staggering that this situation could be created, not that the people in that moment should behave that way; that's perfectly understandable. What's staggering is that we should have created the conditions where that's possible.

The Chair: Thank you.

Mr. Boissonnault.

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you very much, Chair.

Thank you to all the witnesses for your passion and your advocacy.

Professor Coughlan, I am very much looking forward to getting rid of the zombie provisions, including section 159 and others that you have mentioned. Thank you for your very lucid testimony on the subject.

Calla, I want to put on the record that this committee will be looking at an HIV over-criminalization study later this fall, as early as December, and no later than early 2019. It's something that I put in front of the committee and the committee accepted, so that study is coming.

The question that I have for you, briefly—because I'm using my seven minutes judiciously to get to all four of you—is why is it so important to list LGBTQ2 people in the marginalized person provision?

● (1705)

Ms. Calla Barnett: That's because it's not always visible that we are LGBTQ2SIA. You can't see it on us, so we would have to disclose to a judge in the first place.

Doing so could put us at risk if we are not explicitly protected under the marginalized person definition. High-risk behaviour that may have come to pass in an LGBT person as a result of that discrimination that they face by society may not be taken into consideration when it otherwise should be.

Mr. Randy Boissonnault: Thank you.

For the record, is it true that when you use the acronym LGBTQ2SIA, you're referring to the lesbian, gay, bisexual, transgender, queer, two-spirit, intersex and asexual populations?

Ms. Calla Barnett: Yes, that's correct.

Mr. Randy Boissonnault: Thank you very much.

Dean Leckey, I want to talk with you about your comments on the intersex community in paragraph 268(3)(a). Before I ask you a pointed question, I will say for colleagues on the justice committee that we're talking about babies who are born with ambiguous genitals. They don't present as boys or girls. In the past they would have been referred to as "hermaphrodites", but the community has evolved. People in the community use the term "intersex". This is a very important community. It's a marginalized community.

We have done work at the LGBTQ2 secretariat, working with people such Dr. Morgan Holmes and others, so that people can understand what happens. Imagine that you're parents and you have a baby, and the baby presents ambiguous genitals. Medical professionals in this country can decide the sex of your child at birth. They have a 50% chance of getting it wrong or a 33% chance of getting it wrong, depending on where that baby is on the gender spectrum.

Friends of mine on Vancouver Island had a child 15 years ago with ambiguous genitals. They found a medical professional who told them to let the child grow up. It was exactly what the parents wanted. Two months ago, that now-15-year-old had a gender-reveal party and picked a gender. I'm not going to tell you what was picked —because it doesn't freaking matter.

What matters is that nobody poked and prodded this 15-year-old teenager. This teenager grew up to be a totally happy kid and has now chosen a gender. We empower medical professionals to basically bring harm to babies. That's not cool. We should not allow that.

Professor Leckey, what language would you have in this section to prevent this from happening?

Prof. Robert Leckey: Thank you for the question.

I would perhaps keep the exception of an intervention for the health. I don't think you need to keep "for the purpose of...having normal reproductive functions or normal sexual appearance or function".

In the cases of intersex children, as I understand it, the surgery is not going to be able to generate reproductive capacity that the person does not have. Often, a botched surgery can destroy a person's capacity for sexual pleasure, and so on.

I would slice away the whole idea that there is the normal appearance or sexual function with nothing pressing medically, and that this alone is the basis for intervention.

Mr. Randy Boissonnault: Thank you. We'll look forward to a brief from you on this matter.

That was a slight request to my friend and colleague Dean Leckey.

This question is for Dean Leckey and Professor Hooper—and to Professor Kinsman, should you wish. Suppose the government could carve out the bawdy house provisions along a community standard that would keep the non-consensual harm provisions—as rewritten by the court—on the books, and then have a schedule written up for cabinet that could become part of the expungements to legislation to allow people such as Ron Rosenes and the some 1,300 people that Mr. Kinsman and others have indicated have criminal records from 1968 to 2004 for having been arrested on bawdy house laws.

If the government could do that, and attach that schedule to the expungement legislation allowing those men to have their records repealed, would it then be fine—according to you—to leave the remnants of bawdy house provisions on the books as non-consensual harm offences?

Prof. Gary Kinsman: The bawdy house laws come from a historical period and continue to carry with them a certain type of enforcement of morality. There are problems that might exist in terms of the situations you're describing. Those are much better dealt with under provisions of the Criminal Code that actually deal with harm, violence and harassment. Those are what we really need to look for. Historically and politically, it's absolutely crucial that the bawdy house laws be repealed in their entirety if we're going to follow through on the apology from Justin Trudeau.

● (1710)

Mr. Randy Boissonnault: Dr. Leckey.

Prof. Robert Leckey: It also strikes me as problematic. As I understand it, in the other offences that have been repealed and have the expungement mechanism, all instances of the offence could be expunged.

You're essentially proposing that we look back to past convictions for being in a bawdy house or running a bawdy house, and you'd have to decide which ones were bad, inappropriate, Victorian or homophobic policing, versus the ones that were permissible. I think it would actually be complicated on the implementation side, because it would not be a category of convictions. You'd have to look at the details of each one.

Mr. Randy Boissonnault: That's helpful.

Professor Hooper.

Prof. Tom Hooper: I think there's a principle that this law should not be there. What is the rationale or the justification for maintaining the bawdy house law in its current form?

It's not being used, so it's sitting there. When I listen to Professor Coughlan, I hear this idea that when you have laws that are in the Criminal Code, that's what they should actually mean. When you read the Criminal Code, that should be instructive to you as to what the law is.

Mr. Randy Boissonnault: It should be the law.

Prof. Tom Hooper: Right.

Anybody here, go read the bawdy house law and tell me what it means. It's not going to mean what the Labaye case says it means.

Mr. Randy Boissonnault: I will be able to relate with my 15- and 17-year-old, and maybe even my 11-year-old nieces and nephews, after having talked about zombies and Frankenstein in Ottawa today.

Thank you all very much.

The Chair: I have to get to Mr. Rankin next.

Mr. Rankin.

Mr. Murray Rankin: I'll give you a chance to expand, Dr. Hooper.

I just want to say, for the record, that I thought it was a very good illustration of the importance of legal history that you're here today and you've told us about the history of these laws, which frankly, I was unaware of. I find it entirely persuasive, and I will be moving before this committee for the repeal of the three sections that are addressed in Bill C-75, namely vagrancy, indecent acts and the bawdy house provision.

I totally accept your analysis. I think if there are issues that remain they can be handled through other sections of the code, or we can tailor it to suit what needs to be done in the 21st century. I want to salute you for your use of history so effectively.

Professor Coughlan, I loved your presentation. I found it very lucid. I wonder, while you're at it, if you could get rid of the decimal points in the Criminal Code. Could that be part of the review? Because it's impossible to remember anything in the code. Maybe I'm dating myself, but that should be part of that task force. Could that be added to the job description of that summer law student you talked about?

Prof. Steve Coughlan: I do have a response on that, because I think it raises an important point. The reason we now have sections like paragraph 487.011(b.1) is because we amend the Criminal Code constantly, and of course, we can't renumber everything. I want to tie together your last point with that, because I think there is a bigger issue here.

On the one hand, I have found everything I've heard from my fellow panellists today to be persuasive and I think, "Okay, yes. Why is this not in here as well?" But of course, normally when you have a bill and you're thinking, "Why isn't it doing this?" it's because the bill is aimed at doing something else. Most bills are not aimed at doing everything that could possibly be done, but this bill is actually so big that it's a perfectly understandable reaction on anybody's part to think, "You're already doing all of those unrelated things. Why don't you do this other thing, which would be a good thing as well?" This actually leads me to the bigger point: Why not just bite the bullet and undertake fundamental reform of the Criminal Code?

Mr. Murray Rankin: Right.

We used to have a law reform commission—

Prof. Steve Coughlan: We need to do that. We've needed to do it for decades—not just for minor things like this, not just because of laws that are out of step with the times, and not just because the interlineated numbers make it impossible to keep track of everything, but because we've needed fundamental reform of the Criminal Code. The Minister of Justice in 1979 said it was time to undertake a systematic review of the Criminal Code, and we still haven't done it.

This is so close to doing that anyway. It's doing so many things. Let's just do it for real.

Mr. Murray Rankin: We call them omnibus bills. Things just get conflated. They throw everything but the kitchen sink into it. We don't have a law reform commission anymore, there's no—

● (1715)

Prof. Steve Coughlan: And we should.

Mr. Murray Rankin: —as the federal government calls it, responsibility centre for just doing this cleanup work. British Columbia, and I'm sure other provinces, have what we call miscellaneous statutes amendment bills. Every year, from A to Z, sections that are spent or have been found to be unconstitutional, are thrown in. They're passed unceremoniously on the last day of the session, routinely, with no debate. I don't understand why we can't do that here today.

I thought Mr. Cooper gave a very thorough account of what the Travis Vader situation meant. I'd hate to be Justice Denny Thomas in making the error that he did because he had the temerity to rely on the written text of the Criminal Code. What a thing to have to be saddled with. I feel sympathy for him.

You used the word "dumbfounding". I haven't heard that word before. As a Canadian, I would use the word "embarrassing". Frankly, it's embarrassing that we've let it get this far. As Mr. Boissonnault said, your testimony was very lucid and compelling in this entire context.

The Chair: Do we have unanimous consent for the committee to proceed until we finish our other questions?

Some hon. members: Agreed.

The Chair: Thank you.

Mr. Murray Rankin: I want to build on what Mr. Boissonnault asked you, Dean Leckey, if I could.

Of course, you haven't done the thorough charter analysis that would be required, but I think you said very clearly that you thought that Justice Canada's charter statement in respect to certain provisions was inadequate. I can't recall if that was with respect to paragraph 268(3)(a) of the Criminal Code, about intersex children and their protection, or if you were talking about paragraph 25(c) of Bill C-66.

I'm going to ask you to repeat that.

Prof. Robert Leckey: It was actually a third option. The charter analysis by Justice was about proposed section 156.

Mr. Murray Rankin: All right. Could you elaborate a little bit on that? I know you haven't done the analysis, but why would it possibly not be charter-compliant?

Prof. Robert Leckey: It's because with proposed section 156 the intention is to preserve the power to prosecute historical conduct that we still believe is reprehensible. This includes same-sex abuse of children by priests in orphanages, and that kind of stuff. There's no attempt to make that out of the criminal law's reach when we repeal 159.

The problem with 156 is that it relies on today's age of consent of 16 as the basis for deciding whether something can be expunged or not. To me, it's unfair that in the past, when the age of consent for "ordinary" different-sex intercourse was 14, it feels problematic to me that historically we're in a sense lowering the age of consent for anal intercourse, but only to 16. There is actually a group of people who had sex—an 18- or 19-year-old having sex with a 14-year-old—and if they had been a boy and a girl, that would have been perfectly legal.

If it were two men, and if 156 passes as it's currently drafted, there's the potential that you could prosecute for sodomy or anal intercourse, because under today's law a 14-year-old cannot consent to someone more than a couple of years older.

Mr. Murray Rankin: Thank you. I understand.

Is there any time left, or am I finished?

The Chair: You're finished.

I just want to make sure we get it in before the buzzer.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thanks. I'll be very brief because I know the bells are going.

I just want to thank all of the witnesses for appearing today. This has been a very interesting round, and I appreciate the presentations that have been made.

Professor Coughlan, I really appreciate the thoughtful way you put forward your argument, and in a very sound way that made a lot of sense. What I'd like to ask you is, if there's going to be a possibility of having, every couple of years, these charter cleanup bills come forward, given the fact that sometimes court rulings impact on one part of a section, or elements within a section of the Criminal Code, I would imagine that it would be wise to have some sort of consultation to ensure that it actually reflects the court ruling.

You mentioned a law reform commission being necessary at the federal level to try to give some guidance, perhaps, to legislators when they're drafting that. How else could you see any sort of consultation with the legal community for that kind of bill that cleans up our code as we go?

Prof. Steve Coughlan: In an informal way, such lines of consultation exist now. As I mentioned, a large group of criminal law academics sent a letter to the Minister of Justice in December of 2015. That has led to some informal collaboration on a number of things. We have provided the department and the minister's office with the names of people who are interested in, and experts in, a number of different areas. I know, for example, you've heard from Marie-Eve Sylvestre on the bail issues, and she's one of the people on the expert lists around bail. Really, at that informal level, those lines are there.

There certainly would be no harm in something more formalized, though. Personally, I am in favour of the notion of a law reform commission to have something on an ongoing basis, but the last time the Criminal Code was amended—which was, embarrassingly, before I was born—a royal commission was struck. A royal commission to amend the Criminal Code conducted those kinds of consultations with affected communities. This was not just with academics, but of course, with the people themselves who were connected, either through, say, Pivot Legal Society to get input from that community, or the kinds of organizations that are here as well today. We want wide consultation, not just with academics about this but with the affected people.

● (1720)

Mr. Colin Fraser: Great, thanks.

I know my friend has a question.

The Chair: Thanks for giving me the rest of your time, Mr. Fraser.

I have three short questions, so short answers, please.

Dean Leckey, on the proposed section 156 issue, is the issue, for you, that you're concerned that men today, not benefiting from the close-in-age exemption, will be charged for acts before 2008 where they had sex with 14- or 15-year-olds, or are you concerned that their convictions for something they have been convicted for, for having sex with a 14- or 15-year-old before 2008, will not be expunged?

Prof. Robert Leckey: It's both. I think the chance of fresh charges being laid now is relatively remote. I think it is more concrete in that it's a gap. I don't think the expungement provision goes as far as it was intended to go in Bill C-66. Given that we know that the criminal law can be used in ways we don't imagine, I think you should fix them both, but I also think realistically there's a real problem with the expungement.

The Chair: That's perfect.

Mr. Hooper, Mr. Kinsman, following Bedford and following Labaye, as I read the bawdy house provisions right now as they are stated, they are not at all what the judgment in Labaye says, so nobody, on the plain reading of the bawdy house provisions, would know what was illegal.

Would you agree with that?

Prof. Tom Hooper: Absolutely, Chair.

Prof. Gary Kinsman: Yes, it uses language like "acts of indecency" that are incredibly vague and have no concrete meaning at all.

The Chair: Following your reading of the current statute and the decisions in your historical analysis, would you be able to confirm that absolutely no provision is meant to be touched by the bawdy house provisions that is not covered by another provision in the Criminal Code, which remains in existence for what the court said that it should mean in Labaye?

Prof. Tom Hooper: I don't know what a bawdy house would look like in 2018 and I don't know if it has ever existed.

The Chair: That's perfect, and—

Prof. Gary Kinsman: If the problem was violence and harm, other sections of the Criminal Code are much more appropriate to deal with that.

The Chair: I totally agree.

Ms. Barnett and Dean Leckey, on the last issue you raised on intersex children, I completely understand the issues that you and Mr. Boissonnault presented. I just want to be reassured that the interpretation you're giving in terms of doctors and parents making a sex selection at birth in no way would infringe upon the rights of parents to circumcise their children in the future for religious reasons or other things. You're not making the argument that parents should lose such a right, are you?

Ms. Calla Barnett: No, I'm not making that argument.

I don't think that what Dean Leckey has indicated should be repealed, the language, there is no—

The Chair: I agree it's not covered under that. I just want to make sure that we're not introducing an argument that it should be criminal to do circumcision

Dean Leckey.

Prof. Robert Leckey: No, I don't think so. The basis for a circumcision being permitted today is not that it's producing a normal reproductive function, or that it's giving a normal sexual appearance.

The Chair: That's perfect. I really appreciate that.

Thank you, Colleagues, and thank you to this panel.

We will be back for the next panel following the votes.

The meeting is recessed.

● (1720)

_____ (Pause) _____

● (1805)

The Chair: Hello, colleagues. I want to apologize to our third panel of the day for being late. Votes in the House of Commons sometimes are things we cannot control.

It is a pleasure to welcome our third panel of the day on Bill C-75. We're joined by Mr. Joel Hechter, barrister and solicitor. We're also joined by the Canadian Association of Crown Counsel represented by Mr. Rick Woodburn, president. By video conference from Kelowna, British Columbia, representing the Toronto Police Accountability Coalition, we have Mr. John Sewell.

Welcome.

Mr. Sewell, because you are here by video conference, we're going to you first. You have eight minutes. I turn the floor over to you.

Mr. John Sewell (Member, Toronto Police Accountability Coalition): Thank you very much.

I'm in Kelowna because my wife and I are visiting friends in the interior of British Columbia, so although I'm usually in Toronto, today I'm in Kelowna. The weather out here is terrific.

I'm the coordinator of the Toronto Police Accountability Coalition, an organization that's been around in Toronto since 2001. Our job is to propose progressive policies to the Toronto police board and the Toronto police force.

We've been dealing with lots of issues in the last 17 years. Some of the more recent ones are carding, how the police deal with those in mental crisis, the question of strip searches, racial profiling, police oversight, police training and police recruitment. TPAC has an electronic bulletin that is published bimonthly for free. It generally summarizes the kinds of things that are happening in Toronto and our thoughts about them.

TPAC has submitted briefs to the Toronto police board in support of a policy requiring Crown attorneys to report to the board in cases where a judge has concluded that an officer was not telling the truth under oath. That seems to happen three or more times a year in Toronto. The board has now adopted such a policy.

Our concern that we want to voice today is in regard to proposed section 657.01 of the bill. This section permits police evidence to be entered by way of affidavit. It says that affidavit evidence can be used for the presentation of routine police evidence.

I want to deal with some of the things that seem to be routine at the current time, at least in Toronto, and I suspect in other cities.

One is carding, where police stop citizens at the whim of the officer, who demands certain information of those stopped. Carding has been considered a routine of the police in Toronto and in Ontario until very recently, when the law was changed. We know that carding is basically done to black youth, and it's shown to involve racial discrimination. We think it's unreasonable to suggest that evidence gained this way should be provided to the court by way of affidavit.

Another routine police activity deals with arrest for the possession of marijuana. This is also infected with racial discrimination. Three times as many black people as white people per capita are arrested. Again, we think this is wrong and should not be allowed to happen by way of affidavit.

Thirdly, strip searches in Toronto are considered routine. At least 40% of all those arrested for any crime in Toronto are strip-searched, even though the Supreme Court of Canada has declared in its decision in 2001 that such searches should be rare, which we interpret to be less than 10%. As we know, the fact that strip searches have been done is in some cases a reason for the judge to throw charges out.

The other point we'd like to mention is that there are instances, which I've mentioned already, where police evidence in court is challenged as being untruthful. Sometimes officers give evidence that they know is untrue, and the courts struggle to determine what the truth actually is. Often, courts have to come to this decision on the basis of the officer's demeanour, and that would not be available by way of affidavit evidence.

We recognize that there are some cases where the police affidavit evidence may be challenged, but we aren't convinced that's a good way to proceed. It's sort of after the fact. We believe that this section should be deleted from the bill.

We do want to stress that we wish to support actions that shorten trials in order to save precious court time and resources. This is an issue that our organization has addressed. We think the way to proceed on that is by instituting pre-charge screening, where Crown prosecutors sit with officers to determine what charges should proceed.

● (1810)

This now happens in three provinces in Canada: British Columbia, Quebec and New Brunswick. In fact, there has been a very significant saving of time for courts because of pre-charge procedures. In Ontario, the charges that would actually proceed would be reduced from about 93,000 per year to 70,000 if pre-charge screening were in place and the same rules were adopted as those in Quebec.

Also, many fewer cases are stayed in courts or withdrawn. In Quebec, the numbers stayed or withdrawn—and that's where they have pre-charge screening—is 9%. In Ontario, it's 46%. If you want to save court time, forget about the affidavit evidence by officers and, instead, proceed by way of pre-charge screening.

That is our submission, which is respectfully given to the committee.

Thank you very much.

● (1815)

The Chair: Thank you very much, Mr. Sewell.

We will now move on to Mr. Hechter.

Mr. Joel Hechter (Barrister and Solicitor, As an Individual): Thank you.

Thanks for inviting me to make these submissions.

These days, it can sometimes feel a bit like the world's going to hell in a handbasket and there's nothing you can do about it. I suspect each of you ran for office because you wanted to do something about it. You want to make things better for your families, just like I do. I'd be a terrible politician, but as a lawyer and a father, I'm here to try to help so that the Canada my son grows up in has the best possible system of criminal justice.

Because I have only a few minutes to address you in these opening submissions, please forgive my bluntness. There are a few good measures in Bill C-75, but much of it, from where I sit, appears arbitrary. I'm very concerned that if it passes in anything close to its current form, it will do far more harm than good, which is really too bad.

In respect of the consultation that's taken place, I have been looking at some of the evidence you guys have already heard, and I've read some of the briefs that have been submitted to the committee. Had this been the process before the bill was tabled, I suspect it would have come out quite differently. The government would have had the benefit of thoughtful submissions from criminal lawyers who spend every day dealing with these issues. Now that it has passed second reading, however, the government has poured a lot of political capital into it, and I worry that despite your commitment to do what is right, what I'm about to say may fall on deaf ears.

My principal recommendation is this: Don't rush this.

When you step back and take a look at this bill from a distance, a pattern emerges. Bill C-75 gives greater discretion to police officers and Crown prosecutors, restricts the discretion available to accused persons and their representatives, and fails to restore the discretion that was taken away from judges by the Harper mandatory minimums.

On that last point, we all know that Senator Kim Pate managed to draft what I think is a fairly simple fix to the mandatory minimums several months ago in Bill S-251. You take out the preamble and the explanatory notes, and that bill's three pages long, including both official languages. It's simple, elegant, drafted to stand the test of time. As you know, a week later, your colleague Sheri Benson, NDP member for Saskatoon West, proposed a similar solution with Bill C-407.

I was really disappointed to see that after nearly three years of studying this issue the government has not tabled anything in this bill to deal with those mandatory minimums. I say this with a bit of sadness, but also with respect. I submit that the government's actions may speak louder than the words they're using to describe this bill. What does this action, this Bill C-75, say? It says that a lot of trust is being reposed in police officers and Crowns, which in certain circumstances is perfectly reasonable.

But let's look at what that actually means. If the bill passes in its current form, officers will have a lot more discretion for dealing with breaches, for example. Permitting officers to give evidence in writing, which Mr. Sewell was just talking about, maybe without even being cross-examined is a breathtaking expression of trust. For their part, Crowns are going to be entrusted to decide what procedural protections are available to accused persons in a much wider scope of cases.

I'm not pulling this trust thing out of thin air. As parliamentary secretary, Mr. Mendicino, who is no longer part of this committee but was until recently, made it clear in the House that Bill C-75 is meant to increase the Crown's ability to exercise informed discretion on a case-by-case basis. That's one big reason why the government is hybridizing so many more offences.

He said this shortly after suggesting in the House of Commons on the same day—and this was June 5, 2018, in response to a question from Elizabeth May about routine police evidence—that defence counsels suffer from bad judgment and quibble over immaterial things.

Now, don't get me wrong. I'm not saying that Crown discretion is a bad thing. We know that Crown discretion is a key part of a properly functioning judicial system, of a criminal justice system. But as the Supreme Court made clear in a case called Bain back in 1992, basic rights cannot depend on the continuous exemplary conduct of the Crown. That case, interestingly enough, was about peremptory challenges and stand-asides. At the time, the Crown had significantly more opportunities to affect jury composition than the defence. The Supreme Court said that this was inconsistent with subsection 11(d) of the charter.

● (1820)

By contrast to all that additional discretion granted to agents of the state, Bill C-75 takes away from my colleagues and me basic tools that we use to ensure that justice is done fairly. Our role as a check against abuse is significantly constrained. To be clear, abuse does sometimes happen. That's why in my brief, which I know you all got this morning and so you may not have had a chance to read it, I recommend enacting a criminal provision prohibiting non-disclosure.

The justifications for this bill that I see in Hansard don't make a lot of sense in a free and democratic society. Take this idea of sparing witnesses from having to testify twice. If you take that to its logical conclusion, complainants would be spared even more if we moved straight from arrest to conviction without the need for a trial. We'd also save a lot of time and a lot of money, but that's not what a fair system of criminal justice does.

If we look south of the border, the United States Supreme Court talked about the need to ensure the integrity of the fact-finding process through things like appropriate cross-examination. This is from a case, Coy v. Iowa, from 1988 in the Supreme Court. It said that while the process "may, unfortunately, upset the truthful rape victim or abused child...by the same token it may [also] confound and undo the false accuser, or reveal the child coached by a malevolent adult." The court concludes that passage by saying, "It is a truism that constitutional protections have costs."

Our system of criminal justice is not exactly the same as the Americans', nor should it be, but that case says something universal. We don't have trials because they're convenient. They're not. Nor are they generally much fun for the people involved. They can be expensive and in rare cases they can take a long time.

I can assure you, despite what you may have heard, that the defence bar is not complacent about that. The overwhelming majority of accused persons want the whole process over as quickly as possible, but not at the cost of injustice.

While cases with a preliminary inquiry often do take longer than those without, that's no reason to abolish most preliminary inquiries. It's simply a reflection of the fact that more complex cases tend to be the ones that require prelims to ensure that the subsequent trial is fair. Every Canadian accused of a crime, not just those facing a life sentence, rightly expects to have a fair trial.

Perfection is always going to be unattainable, but procedures that support fair trials are critical to preventing wrongful convictions. In many Canadian criminal cases, a well-conducted prelim is what makes the subsequent trial fair. Cross-examination as a right is a cornerstone of fairness in free and democratic societies around the world, so I urge you to carefully consider the consequences of passing Bill C-75 as is. It will take years of expensive litigation to undo the damage, during which time a number of innocent people will almost certainly lose liberty as a direct result of the bill. Fix it now and you can prevent that.

Thank you.

The Chair: Thank you very much.

Mr. Woodburn.

Mr. Rick Woodburn (President, Canadian Association of Crown Counsel): Good evening, everybody.

Listen, I know it's going to spread around that I may have a flight. I'm not worried about that. The important thing here is that we get this right, so don't hold back on the questions.

I'm Rick Woodburn, the president of the Canadian Association of Crown Counsel. We represent approximately 7,500 Crown counsel across the country, from the 10 provinces and the federal government. This is both Crown attorneys and Crown counsel, so a wide variety of input came into our submissions.

I didn't file a brief. However, we have limited submissions that we'll make, and we'll take questions, of course, as need be.

Thank you to the panel for inviting us. I appreciate that. Some of our comments may go against the grain a bit. I don't want to disparage anybody, the drafters of legislation or anybody who worked diligently on this, but we would like to delve into it a bit.

Our role isn't going to be to endorse or go against the bill itself, but we want to give you the pros and cons, give you some information about what, on the ground, prosecutors and Crown counsel are saying about this particular bill.

Between Crown counsel, of course, we're not universally in agreement with all the sections either. There are viewpoints from both sides, and I hope to get some of that out today, at least to give you the information so that you can perhaps go back and when you think about amendments and about the different sections, some of these things will help in terms of knowing what's going on, on the ground.

The first thing we'd like to look at is the bail reform, and particularly the change from sections 523 and 524 to the new section 523.1.

My understanding of proposed section 523.1, which would be inserted just before section 524 and takes up that entire section, is that we're not eliminating, from what I can see, section 523. Therefore, there's still that opportunity for a Crown to make an application to have somebody's bail revoked. In the Crowns' submission, what this extra layer does is just tack on, in some aspects, another administrative hearing to charges of breaches, and so forth. When we look at it, it actually is repetitive in a lot of senses. We all agree that we're trying to prevent delay here, and having a repetitive section in the Criminal Code won't necessarily help us.

Here's what I mean.

When we look at section 523 as it is right now, the Crown has the discretion to do everything that proposed section 523.1 says. We can withdraw the charge, we can ask that the bail be revoked, and so forth. We can already do that. Proposed section 523.1 presupposes that the Crowns aren't looking at the charges when they first come in and assessing the strength of the Crown's case, but we are. As Crown attorneys, it's important for us to ensure that these charges, these breaches of bail, are sufficiently looked after. In our submission, it's just another layer that is not needed in reality, because the Crowns are already doing their jobs and vetting through this.

The other thing that is interesting about administration of justice charges, or breaches, is that there seems to be a lot of talk about the number of breaches that are in the system and how they're clogging it up. I can tell you from the ground, they don't clog up the system. They don't take that much time. A breach of a court order takes very little time to prove, even if it goes to trial—and that's rare. Keep in the back of your mind that these charges aren't clogging up the system. There are lots in the system, but they're not clogging the system.

The other thing to remember about these charges is, when somebody breaches their court orders, it's important for everybody to realize that this is a cornerstone of our bail system: Somebody has been released on bail, they're supposed to be following conditions and they don't, so they're arrested and brought in. There has to be a penalty to this. My understanding of proposed section 523.1 is that actually, if it plays out, it looks to be more of a slap on the wrist. Believe me, the criminals will realize fairly quickly if there's this extra layer and they can use it, and there will be more people breaching their court orders.

That's a little about the bail reform. Of course, we'll be open to questions later about that.

● (1825)

When we look at preliminary inquiries, we see a lot has been said. I've heard some of the testimony and read some of the briefs. It's very controversial about eliminating preliminary inquiries for non-life sentences.

Once again, Crown attorneys have voiced opinions on both sides of this, and I'd kind of like to give you the pros and cons a little bit about that. First, among the pros to getting rid of them, one of the obvious and most glaring concerns sexual assault victims. Of course, having sexual assault victims testify twice, even a witness here has stated, re-victimizes them, and I've seen it first-hand. Eliminating that will perhaps encourage people to come forward in sexual assault trials. They know they will only have to testify once. Of course when we talk about testifying, that also includes children.

For some reason the bill doesn't include aggravated sexual assaults. In those cases, of course, there's a right to a preliminary inquiry.

There are some issues from a Crown's perspective with regard to preliminary inquiries as they stand right now. Part of it is the so-called focus hearings, and that's where Crown and defence go before the court and we tend to focus the issues at trial. What we're finding more often than not is that they're not getting focused. We end up running what's called mini-trials and we're put to the test to prove our case under the Shepherd test of course. The focus hearings you hear about in the Criminal Code don't necessarily work the same way that they're being explained to you.

The other part is putting forward our case by paper or putting in the witness statements and so forth. Different jurisdictions do this different ways, but what I'm hearing is that in most jurisdictions the courts aren't allowing and defence aren't agreeing to the Crown simply putting in a paper preliminary inquiry. Different jurisdictions do it differently, but we're finding that it's not really the case there. When we're looking at eliminating preliminary inquiries, we see some of the issues that are attached and, I guess, the pro side of it.

The con side of it is, of course, that it doesn't give an opportunity for the parties—not only the Crown but the defence—to analyze the case, see the witnesses, see how the evidence actually comes out. It also doesn't allow for the Crown and defence to come to some sort of resolution after the preliminary inquiry. Those are some of the things that are missing when you're talking about that.

There are some pros and cons, and we've heard some of those already, but I think it's important to keep those in mind.

One of the other things is about the peremptory trial challenges, and that's important. I've done probably 50-plus jury trials and been through many challenges for cause, and it will last somewhere in the range of a day to a day and a half for a homicide trial, so it's a lengthy process as it is right now and if you look through the general exemptions, specifics, and then peremptory challenges, and sometimes a challenge for cause depending on how high it is.

I notice in the Bill now, in proposed sections 638 and 640, that while peremptory challenges are eliminated, the challenge for cause section is actually still there. If you look at it under proposed subsection 640(2), you'll see that there is room for defence counsel and Crown to raise issues regarding the impartiality of a juror. "Juror" as it's been interpreted means the jury panel, so when we have a challenge for cause, that's the section that's invoked. If you look at it, the logical end to that is that we're going to have challenges for cause in more cases, which take a great deal of time, so that's one issue.

● (1830)

The other issue, of course, is that ultimately the judge is going to make the final decisions on each juror who's picked.

If you look at how this is going to actually play out in a challenge for cause, some questions are done up between the Crown and defence and decided upon. Each juror is brought in and questioned. How we envision this to unfold is that the jurors are brought in, they're asked the questions, the defence and Crown are given an opportunity to speak to it, and then the judge is going to ultimately make a decision with regard to whether or not that juror is impartial or not, and that continues on until you have your 12 or 14 or 16 jurors, depending on how it goes, which will make it a lot longer process. It can move from a day to two or three days, depending on how long it's going to take.

The way that we see this is that it's very problematic because you've taken one issue and turned it into a bigger issue, in our submission at least, but we can see how it logically comes out.

Of course there are the cases. The Supreme Court of Canada has stated that a judge should and shall stay out of those impartiality hearings, so their making a decision on the impartiality of a juror inserts them right into the picking of the jury itself. The Supreme Court of Canada says that may be unconstitutional, which is where that part of the bill may end up after we run a couple of jury trials. We find that problematic.

How are we doing for time?

● (1835)

The Chair: You're past your time.

You might as well try to wind it up, if you can.

Mr. Rick Woodburn: On hybridization of offences, there are two basic things we can say about that. Obviously 12 months for the summary offence is fine by us, I guess. The increase from six months to two years is not problematic because Crowns in a sense have to make a decision about whether or not somebody is going to get more than six months or less than six months when we're looking at a summary offence. We've been electing indictably in a lot more matters when we feel that, given the nature of the offence, the record of the accused and other circumstances, we have been having to go by indictment. That's one of the issues we've had. Now that it's gone up to two years, there's that grey area where for people who could be getting more than six months but less two years, we can actually elect summary. That's the pro. The con of that, of course, is that you may see a lot more serious cases and more cases in provincial court.

Thank you very much for your time. Sorry, I went over.

The Chair: No problem. Thank you very much.

We move into questions.

Mr. Cooper.

Mr. Michael Cooper: Thank you, Mr. Chair. I'll direct my first question to Mr. Sewell.

You made reference to different types of routine police evidence. One of the issues with Bill C-75 is that routine police evidence is pretty broad, as it's defined. It includes everything from observations, to identifying or arresting an accused, to the gathering of physical evidence. That doesn't sound to me like routine police evidence. That sounds like it could be the entire case in terms of evidence.

Mr. John Sewell: Yes. I don't disagree with that. I gave some examples of things that have been considered routine in Toronto, but in fact, it's a very broad definition, and I think that's a problem. That's why the section should go.

Mr. Michael Cooper: Do you care to weigh in on that?

Mr. Joel Hechter: Yes, I think not only is it overbroad, but it's problematic in that you guys and your colleagues in the House aren't psychic. It's impossible to know before a charge is laid or even a crime has been committed what's going to be important to cross-examine at a trial. I routinely as defence counsel build the defence by cross-examining different police officers and figuring out what exactly it is that is important. I figure it out in advance, but it's helping the judge or jury figure out exactly what is important.

We as counsel, and I'm talking about Crowns and defence counsel, routinely put together agreed statements of fact—which I know you guys have already heard about—because sometimes issues aren't in dispute, and that tightens things up and we all see that. Like I say, we're not complacent about delay. We want to see things move expeditiously as well, but to say in advance that any category of evidence is going to get a free pass from cross-examination or that we have to apply to cross-examine a particular witness, makes no sense. It is unprecedented really in common law jurisdictions around the world that you would have to apply for the basic right to cross-examine, which is protected under the ICCPR, as I mentioned in my brief. Should there be something that's truly trivial, it can go in an agreed statement, but you can't know here and now—with the greatest respect because you guys are all clearly very smart and take this very seriously—in advance what is and is not going to be contentious or significant.

An officer contradicting another officer can be the beginning of a thread that unspools the entire prosecution. It changes the perspective of the court. It can lead to an acquittal or, frankly, can justify a conviction. You can't know that until you're in possession of all the facts.

That's my answer to your question.

● (1840)

Mr. Michael Cooper: Thank you for that.

Perhaps you could also speak to how you see this separation of having a stream of offences that would be eligible for a preliminary inquiry, namely those wherein the maximum sentence is life, and for all other offences there would be no opportunity to have a preliminary inquiry. In the case of a robbery offence that might have a maximum of life, for example, there would be a preliminary inquiry option, but for another offence, such as a drug trafficking offence, the sentence that the judge would likely apply might be the same, but in that case there would be no preliminary inquiry. How much sense does that make?

Mr. Joel Hechter: It doesn't make a lot of sense. It seems to me very arbitrary. I understand that the drafters of this legislation were probably trying to figure out how to cut this off and how to make it.... Maybe in the most serious cases, you do need a prelim, but that's not how prelims work and that's not the function that they serve in real-life criminal trials.

We, based on the issues, elect to have a prelim or not. Very often I'll take an indictable matter to a straight OCJ trial—OCJ being the Ontario Court of Justice—provincial-level trial, because there is no point to having a prelim. I just want to go. It's a simple matter. I want to get this done as quickly as possible and so does my client.

There may be something where the maximum sentence is currently somewhere in the range of five years, but the issues are such that you absolutely need a prelim. I talk about this a little bit in my brief, the issue of section 278, because I think one of the unintended consequences of this legislation is that you are going to have in matters that are serious, that are subject to the regime, the Mills 278 regime. I talk about this in my brief, but for anyone who hasn't had a chance to read my brief, it is third party records where there are, to put it as broadly as possible, sexual allegations involved. There's a special set of protections, and one of the most important sets of protections in the regime is that the complainant or witness is not compellable on a third party records application.

What that means is, if I want to establish the existence of records in order to be able to bring them to court and apply for access to them before the trial starts, I use the prelim to do that, because the complainant is there at the prelim. She is not compelled at the application. The prelim is where we build the record to bring the application. If that process is not available, suddenly we're in superior court, if it's a serious matter, and we're in superior court in front of a jury, potentially. The complainant is on the stand, and I'm asking him or her about records that I need in order for the court to do its job finding facts. I'm building the record to bring a third party records application. I then bring the application mid-trial. The complainant is entitled to retain counsel. The record holders, be they doctors or institutions, are entitled to retain counsel. We have a long adjournment to deal with this, maybe a mistrial, because we have a jury sitting there wondering what the hell is going on, and that's not conducive to a swift and effective justice system.

I'm going on longer, probably, than you wanted me to in answering this question, but it really shows how this particular legislation in the context of a criminal code, which has provisions like that, is going to create train wrecks.

Mr. Michael Cooper: Yes, thank you. That's helpful.

The Chair: Ms. Khalid.

Ms. Iqra Khalid: Thank you, Chair.

Thank you to the witnesses for your testimony.

Mr. Hechter, if I may, during my articles—it seems like a lifetime ago—I was prosecutor for the provincial court, also known as traffic ticket court.

Mr. Joel Hechter: Provincial offences....

Ms. Iqra Khalid: Yes. In that, we received dockets of over 50 at a time, where you would have many police officers just waiting around to give their testimony.

My understanding and the way that I understand routine police evidence is that there's still the discretion of the judge to decide whether officers should be brought in for cross-examination or examination themselves.

In your experience—and I'll ask both of you to provide your feedback—what is the percentage of time a police officer's evidence being provided needs to be questioned? If it's not nine times out of 10, and it is in the judge's discretion to allow for cross-examination as is required for the administration of justice, do you not think that this would impact in a positive way delays that our court system faces and also the challenges of our police forces in terms of having police on the streets?

● (1845)

Mr. Joel Hechter: I can tell you that I don't spend a lot of time in traffic ticket court. I'm dealing with matters where police evidence is more often more involved than "I stopped his car, I gave him a ticket, I moved on".

That said, I'm sure my friend will agree with this proposition that Crown and defence counsel routinely, before a trial, try to narrow the issues. If there is an officer whose evidence is not strictly required and we can put it in an agreed statement of facts before the court, or if it's just really not that important for either of us, even though they may have relevant evidence to give on some issues that neither of us think is going to make any difference at trial, then we can dispense with the evidence already. That already happens. It happens a lot.

I did a murder trial that took a long time, but we had 14 separate and distinct agreed statements of fact on different sets of issues, which we put before the jury. It's a system that works, and that the litigators themselves, who know what is and is not important, can control to ensure that the court has everything it needs to make a safe and sound finding of fact.

I recognize that sometimes officers sit around for a while. That is perhaps a little less efficient than we'd all like to see. There was an article written by Michael Bryant, former attorney general of Ontario, in which he said that efficient justice is kind of like efficient music or efficient circumcision—not a really good idea. There's a certain point at which efficiency can trump justice, and you cannot take efficiency to the point where it gets in the way of justice being done.

There has to be a point somewhere. I think that forcing the defence to apply for an officer to come and give evidence so that they can be cross-examined and, in some cases, having to reveal why it is that they want to cross-examine that officer when they are trying to establish something, like a charter breach or something else.... We do, in our notices of charter applications, set out the basic things that we're alleging, but it is sometimes.... There's a set of cases out of Alberta called Evenson, which talks about the danger of giving too much information to a witness in advance, even a well-intentioned witness, because it can change in retrospect, when they think about things, their own memory of how something went down at the time.

Cross-examination is a difficult process and one that we have to preserve and protect, so—

Ms. Iqra Khalid: To my understanding, though, the way I read the provision is that it's a decision between counsel and the judge, not the police officer.

Mr. Joel Hechter: Yes, but if counsel has to apply, then they're providing to the court and the prosecution—and to the public, ultimately, unless the application is sealed—all the information about what they want and why they think the officer should be there. There's nothing stopping the officer from getting that information.

Ms. Iqra Khalid: Mr. Woodburn, do you have some input?

Mr. Rick Woodburn: Not as much as that, but my friend is correct in some aspects.

Look, we have agreed statements of fact all the time. It's not an issue as far as the section goes. If we need to call a police officer, we will. Sometimes they have to wait around. That's what happens. In a lot of the routine police evidence, if two officers can speak to the same thing, we call one of them. It's easier and faster just to call the officer than it is to draft an asking for permission and do everything else. Overall, we're going to end up just calling the officer.

Ms. Iqra Khalid: Again, I want to clarify so that I understand this correctly. Basically, this routine evidence provision takes discretion away from the counsel and puts it in the hands of the judge to decide whether or not a police officer will be examined and cross-examined and what the agreed—quote, unquote—statement of facts is.

Mr. Rick Woodburn: It is in some aspects, because when the Crown applies and puts forward the affidavit and the defence says they want to cross-examine, the judge ultimately makes the decision, but in reality and on the ground, it's not going to happen that way. We're either going to make an agreement between ourselves that it can go in or I'm just going to call the police officer. It's pretty straightforward. That procedure will bog things down, and that's not what we want. We want efficiency. Ultimately, we'll end up just calling the police officer.

● (1850)

Mr. Joel Hechter: If we have to litigate this, it's going to take a long time, and it's going to slow things down rather than speed them up.

Ms. Iqra Khalid: Do I have time for one more question?

The Chair: Sure, if it's a brief question.

Ms. Iqra Khalid: Thank you. I do want to address Mr. Sewell.

You spoke a little bit about racism and inclusion within the justice system. That's not something, in my opinion, that we can legislate. How far do you think we need to go in terms of providing training to police officers, judges and court personnel in order to really address issues like carding, for example, as you've noted?

Mr. John Sewell: The way carding has been dealt with in Ontario is that the government has passed a regulation basically very much restricting what can happen. I think trying to deal with racism in the police force is a very complicated matter. I'm not sure it could be legislated. I think it has a lot to do with how officers are recruited, how they are trained and how police forces are managed. All those things have to change.

I think we could have a very interesting discussion about the changes that should happen, such as the fact that we should stop hiring officers at the very bottom and slowly progress them up through the system. We should have job descriptions for what they're going to do and what positions they're going to hold, just like every other organization in Canada. I think that would start to deal very considerably with racism. Similarly, hiring people from outside to be senior managers in police forces would seriously cut down on racism. As an example, if police forces hired some senior bank managers in their senior positions, there would be a major change in what was permitted on the force and what was not. Having an interior culture that never changes because everybody comes from the bottom and works their way up reinforces things like racism. That should change.

I agree that it cannot be accomplished by legislation, but it certainly can be accomplished by practice and by government leaders like you arguing that this is what should be happening. Police forces should be changing in that way.

Ms. Iqra Khalid: Thank you so much.

The Chair: Thank you very much.

Mr. Rankin.

Mr. Murray Rankin: Thanks to all the witnesses.

If I may, I'd like to start with you, Mr. Hechter. Thank you for reminding us about the reality of wrongful convictions. In your very helpful brief you made four recommendations, one of which relates to the disclosure issue, and particularly the wrongful conviction of James Driskell. I want to go there, but I want to start with what I think is the first recommendation we've had on this issue. You made four, as I said, but first, you recommend that we enact a criminal offence with respect to non-disclosure. You argue that there should be, in the Criminal Code, a penalty for non-disclosure.

I'd like you to speak a little bit longer about that suggestion. Is it your opinion that the Crown and the police are ignoring their obligations to such an extent that such a provision would be necessary?

Mr. Joel Hechter: We have a treason provision in the Criminal Code. This is not because treason happens all the time but because when it does it's incredibly serious. Non-disclosure has been identified, in many cases, as the primary reason for wrongful convictions in pretty much every wrongful conviction study in this country and elsewhere. Just this summer in the U.K., a committee very similar to this one did a study. The House of Commons justice committee in the U.K. did a major inquiry into a bunch of disclosure problems that led to hundreds of cases being stayed or withdrawn. Alison Saunders, their director of public prosecutions, testified before the committee that people had been imprisoned because of failures in disclosure.

This has tremendously tragic impacts on people's lives, and it continues to happen. I cite in my brief a case that I just finished up. I got a verdict in January on a triple homicide. Justice Dawson of the Ontario Superior Court in Brampton found non-disclosure, cover-ups, and perjury. This is unusual—don't get me wrong—but when it does happen, the officers involved shouldn't be promoted, and guess what. They were. This was at Peel Regional Police. I won't name the officers. They're all named in the decision, and the decision is cited in my brief. The major officers were all promoted within that service. That can't continue.

Mr. Murray Rankin: Thank you.

In the interests of time, I want to get to the other recommendations. You specifically referenced Justice LeSage, saying that he talked about the importance of preliminary inquiries in his report on the wrongful conviction of James Driskell, in part because there were serious problems with disclosure in that case.

I want to ask Mr. Sewell to comment as well on whether or not such a penal provision for non-disclosure of important information would be helpful.

We had Mr. Daniel Brown yesterday also quote Justice LeSage in the Driskell case. Maybe you can tell us more about why you think eliminating preliminary inquiries will cause more wrongful convictions. Some contend that the same evidence will come out at the trial, just at a later date. Could you elaborate?

Mr. Joel Hechter: Is that for me or Mr. Sewell?

Mr. Murray Rankin: It's for you first.

● (1855)

Mr. Joel Hechter: Okay.

Mr. Murray Rankin: Then we'll hear from Mr. Sewell.

Mr. Joel Hechter: There is a real misconception that has to be dispelled here. Prelims and trials are two very different animals. We do different things in them, and prelims and disclosure have two very different functions. Prelims are a discovery process for the defence as much as they are a charge-screening process for the court and the Crown.

Take, for example, sexual assault cases. We know that police—and I talk about this in my brief as well—have been trained and are encouraged to assure complainants that they are safe in making their report, that this is a very good thing, and that they are going to be believed. In fact, the website of the Toronto Police Service on its sexual assault information page says that even if they don't lay a charge, that doesn't mean you weren't believed. Even if the accused is acquitted, that doesn't mean you weren't believed, and of course that is true.

They ask questions to support their investigation and to help validate the feelings of the complainant. We ask questions at a prelim for a very different reason, because we're going to be doing further investigation to prepare for trial. That's one of the things I was talking about with third party records. There are other ways that we investigate to ensure that we're prepared for trial so that the trier of fact, be it a judge or a jury, is in a position to get the best possible information to arrive at a verdict. The police and defence counsel have very different roles, which is why disclosure and the discovery function of the prelim are two very different things.

Depriving us of that discovery function can make it impossible to get all the appropriate and relevant facts before the court and can lead to wrongful convictions, such as Justice LeSage found in the Driskell case.

Mr. Murray Rankin: I'd like to ask you, Mr. Sewell, to comment. In light of what you've put in your very helpful submission, do you think there ought to be a penalty on police and the Crown who fail to meet their elementary disclosure obligations? Would that help?

Mr. John Sewell: The function of the police should not be to get a conviction but to, in fact, ensure that justice is done. Too often, I think police think their job is to get a conviction, and to that extent, I think sometimes some officers actually don't reveal all of the evidence that's there. I think a penalty for non-disclosure is a good idea.

Mr. Murray Rankin: Okay, just to complete this, Mr. Hechter, your recommendation number three is that we should provide evidence in support of abolishing preliminary inquiries. Is that simply making the point that evidence-based decision-making requires us to demonstrate?

Mr. Joel Hechter: Yes.

Mr. Murray Rankin: Also, for the record, your fourth recommendation, joined in by so many other people, is that we should delete the provisions related to routine police evidence—not amend them but simply delete them. Do I have that right?

Mr. Joel Hechter: Absolutely.

The Chair: Mr. Fraser was going to do this round, but he's not here, so he asked me to do it for him.

Folks, I am going to ask you questions. I'm going to try to get in a lot of questions, and if you could just give me succinct answers, I'd really appreciate it.

Mr. Sewell, with respect to routine police evidence, I have already been convinced that there's an inherent problem with routine police evidence. I'm probably not going to be asking you questions because I'm already satisfied on that issue.

With respect to your testimony, Mr. Hechter, I was very struck by the comment you made with respect to the example in the superior court where you'd be seeking third party evidence and you would need to question the alleged victim in that situation and perhaps delay the trial, and that person would then have to come back, potentially multiple times, as you continued to investigate.

You mentioned in your testimony, Mr. Woodburn, that one of the potential advantages was to prevent the victim from having to testify both at the preliminary inquiry and at the actual trial. Can you see the concern that was raised by Mr. Hechter and by other witnesses that this could actually compound the problem by causing excessive delays at trial and also requiring the victim to come back multiple times as you were essentially conducting discovery through your cross-examination of the complainant?

● (1900)

Mr. Rick Woodburn: Each one of these goes case by case, and what my friend is talking about is a rarity, in my experience. It's not something that happens a lot. Sexual assault trials, for the most part, are one-witness trials with maybe some collateral witnesses, and then they move forward. As for third party records, in my experience, when there's been an issue and there hasn't been a preliminary inquiry, it's simply as we have put it before, that it becomes part of the pretrial process whereby we ferret through what we need at that point, and if the complainant needs to testify, and almost never does, with regard to third party records, then we can put her or him on the stand, but I don't routinely see that being an issue.

The Chair: Perfect.

On the preliminary inquiries side, back again to Mr. Hechter, I don't think the disclosure penalties could actually be added to this law. I don't think it would be receivable as an amendment, because it wasn't contemplated in the original draft.

Were we to allow for a broader set of preliminary inquiries, for example, for any offence where the penalty was over five years in prison, and allow for preliminary inquiries to incur where the parties both agreed, or for example, that you can file an application where in the interest of justice you should have a preliminary inquiry, would that generally resolve your concerns with respect to limiting the amount of preliminary inquires that were permitted under the Criminal Code?

Mr. Joel Hechter: I'm going to be as succinct as I can, because that was a sort of tripartite question.

First, I don't think using sentence length as a proxy for the need for a prelim is appropriate. They're two different questions. You're saying, "Here is an apple; what does that tell us about oranges?" It will not help, so I don't think that's helpful.

I can't remember what the second one was, but the third one—

The Chair: The second one was when the parties agree.

Mr. Joel Hechter: When the parties agree, then yes, I think that should be the case.

A leave provision might be better than nothing, but in my respectful submission, I just don't think limiting prelims, because we already have the opportunity if you have a prelim to agree, for example, to concede committal.

One of your colleagues in the House, whose name escapes me at the moment, suggested that discoveries are a way around this. But discoveries in Ontario at least, the practice we have is that if there's going to be a discovery, we schedule a prelim but I concede committals, so we don't need a judge in the room. There's no jurisdiction in the Criminal Code right now to have a discovery without the prelim being the kind of procedural framework for it.

There are all sorts of things we can do to encourage discoveries. I don't think we should be tinkering with limiting prelims when there are other things we can do.

The Chair: Mr. Woodburn, on peremptory challenges, I got your point. What would your feelings be if we, for example, introduced in Canada the Batson test that they have in the United States, where you can't do a peremptory challenge for a discriminatory cause, and if you were to do so, you could be called on it and have to justify your challenge?

Mr. Rick Woodburn: That's a tough question because in the U.S. the jury system is taken as a whole, so you kind of move through it. Right now, we're inserting things in piecemeal and, in our view, it won't work. The issue that we're having is that we're getting closer to that with this whole notion that challenge-for-cause hearings start to become those in the sense that the questions are put to the juror, and then we argue about the juror and then the judge makes a decision. It's very close to what's happening in the United States right now.

The Chair: In this case, if you were to use that as a component, you've retained your peremptory challenges, and then it would be up to the other side to say, "Hey, I think you're using them for a discriminatory reason", and that would possibly in itself limit the number of times that anybody would ever even contemplate doing that, because they could be called out on it.

Would that be a preferable solution to you than stripping them from your repertoire of things that you can do?

Mr. Rick Woodburn: I can't really comment on that, because it still doesn't make sense in our system, from my point of view. It just doesn't.

The Chair: That exhausts my six minutes. Does anybody else have a short question before we go to our next panel?

If not, I want to thank our witnesses. Mr. Sewell, thank you for coming to us all the way from B.C. I'm sure Mr. Rankin was thrilled that you were vacationing in his province. I really appreciate all the testimony as well. It was very helpful to the committee.

I'd like to ask the next panel to come forward. Colleagues, we're combining the next two panels so that we can do one panel, and that will be our last panel of the day.

We're going to take a brief recess

● (1905)

_____ (Pause) _____

● (1905)

The Chair: It is a great pleasure to convene our last panel of the day.

Colleagues, on the agenda, the 6:30 to 7:30 and the 7:30 to 8:00 panel are combined. We have testifying before us today as individuals Ms. Maureen Basnicki and Mr. Christian Leuprecht, who is a professor, department of political science at the Royal Military College. Welcome.

● (1910)

[*Translation*]

Dr. Christian Leuprecht (Professor, Department of Political Science, Royal Military College of Canada, As an Individual): Thank you.

[*English*]

The Chair: From the Evangelical Fellowship of Canada, Ms. Julia Beazley, the director of public policy.

[*Translation*]

From the Association des familles de personnes assassinées ou disparues, we have Ms. Nancy Roy, Executive Director, and Mr. Bruno Serre, Secretary of the Board of Directors.

Good evening.

Mr. Bruno Serre (Executive Board Member, Association des familles de personnes assassinées ou disparues): Good evening.

[*English*]

The Chair: From the Manitoba Organization for Victim Assistance we have Ms. Karen Wiebe by video conference from Winnipeg.

Welcome, Ms. Wiebe.

Ms. Karen Wiebe (Executive Director, Manitoba Organization for Victim Assistance): Thank you. It's nice to be here.

The Chair: We normally put the person on video conference first in case we lose the connection.

Ms. Wiebe, if it's okay with you, I'm going to ask you to go first. You have eight minutes.

Ms. Karen Wiebe: Thank you for this opportunity to address the standing committee on issues that are of particular importance to victims of homicide.

MOVA is a support organization consisting of families of homicide victims, whose sole goal is to support other families of homicide victims.

I would like to speak to you today about four pressing issues that are of particular importance to people like me. You see, I, too, am a mother of a murdered child. My son, T.J., had his life taken on January 3, 2003. The issues I bring forward to you today are not only issues that I know about from my own experience, but are also ones that I've gathered from other families.

The first issue that I'd like to speak to is the poor representation of victims, not only throughout the justice system as it has always been, but even through the justice review process.

The view of those who are requesting change for the accused has been disproportionately requested, compared to the view of victims, yet for every offender, there are between one and 10 immediately affected victims whose needs are addressed in only the most summary fashion. Victims are revictimized over and over again by a process that has no place for them, and yet these victims and co-victims must try to regain their lives with next to no supports. This, in turn, results in drains on the health care and policing systems, to name only a couple.

We constantly hear about the rights of the accused and the rights of the offender, and the judicial system makes every effort to adhere to those rights. We seldom discuss the rights of the victim and co-victims. The supports to them are almost non-existent. As we are looking at reforms of our criminal justice system, we need to put greater emphasis on the rights and needs of victims and co-victims—people and citizens of Canada who have had their lives stolen by the actions of another individual or individuals through no fault and no intention of their own.

In one case in Manitoba where a young man was murdered on a Greyhound bus, 15 of the people who were riding on the bus and who assisted on the bus that day were interviewed. Of the 15, all were still suffering after-effects 10 years later. One person committed suicide and a new mother had her child taken by CFS because of her inability to properly care for her child. Others were suffering from PTSD, and still others were no longer able to hold onto a job and were needing assistance from welfare.

Where are the supports for those people and, in turn, for their families—a few dollars from the province for counselling? Where do we even talk about them and their needs? Who even cares what happens to them?

Are they a drain on public systems? Absolutely. Even economically it makes sense to support those people following the incident, to recognize them and to provide assistance for their return to a somewhat normal life.

The second issue I'd like to speak about is the reclassification of offences. Currently, charges of murder in the first and second degree are often plea bargained down to manslaughter. I realize that this is done for a variety of reasons. There needs to be a separation between cases where a person is charged with an accidental death and a person is plea bargained to manslaughter. They are not the same. However, we have had several cases in Manitoba where, because time spent in custody pre-sentence is realized at time and a half, the offender serves a minimal amount of time following sentencing, sometimes finding that their sentence has been completely served by the time of sentencing.

In cases where there has been a deliberate act of taking of a life, pre-sentence time should not be allowed to be represented as time and a half. It should be represented in the same way as time served for murder or second-degree murder.

The issue could be solved if manslaughter could be divided into two categories: one where the plea bargain could fit and one where accidental death would fit. A common factor for all victims is that the person who deliberately took the life of their loved one be held accountable. We don't want the wrong person prosecuted, but we want the right person to be held accountable. When an initial charge of first- or second-degree murder is made, the charge is based on a deliberate act. That needs to be recognized in sentencing.

The third issue that I'd like to speak with you about is the issue of NCR, not criminally responsible. Families of homicide victims understand the implications of the NCR findings more than anyone, other than the offender.

● (1915)

The issue of mental illness is a huge and timely discussion that is happening throughout many departments and institutions in Canada. Families of victims whose lives have been taken by someone who subsequently has been found NCR are in disbelief that when someone is found NCR in a murder case, there is no requirement to follow them to make sure they are complying with the directions of doctors who will make sure that they take the medications to keep them on track. In these cases, it is as if the health care system and the criminal justice system are failing not only the victim, but the offender themselves. If that person offends again because they have stopped taking their medications for whatever reason, they will end up in the criminal justice system again and they leave more victims in their wake. This could all be avoided if there was a requirement that those who have committed a murder and who are found NCR would still be followed to make sure they remain on their medications.

The last issue that I would like to speak with you about is the lengthy trial delays. I realize and understand there's been a lot of work done across Canada on this. Justice delayed is justice denied. That is true for the accused but it is also true for victims. In Manitoba, we have a case that took eight years from the date of the offence to the date of appeal dismissal. There were two accused and they were found guilty of first-degree murder. They had both achieved bail pretrial. They have now been incarcerated for four years and one is already applying for escorted absences. Certainly this family was victimized by the killers of their son, but they were revictimized by the judicial system over the period of eight years that it took for the court processes to be resolved, and the revictimization continues through a process that recognizes the rights of the offender but only limited rights for the victim's family.

Victims throughout Manitoba, and I'm sure throughout Canada, are thankful for the reforms that are speeding up the trial process. The stories of victims of homicide are months' worth of telling, and the issues of revictimization are many more than I'm given time here to present to you. However, I appreciate the willingness of this committee to hear the issues that I am bringing forward to you today for your consideration.

Thank you.

The Chair: Thank you very much, Ms. Wiebe. Of course, all of us extend our sympathies for what you and your family have gone through.

Because I think that Madam Roy and Mr. Serre are speaking about the same issue, maybe we'll put them as the next speakers.

[*Translation*]

Ms. Roy and Mr. Serre, you now have the floor.

Ms. Nancy Roy (Executive Director, Association des familles de personnes assassinées ou disparues): Thank you, Mr. Chair.

The Association des familles de personnes assassinées ou disparues is a non-profit organization with activities throughout Quebec. Its core mission is to break the isolation of victims' families by offering various resources and tools to help them rebuild their lives. The AFPAD's core mandate is to assist and support families affected by a homicide or a disappearance with an apparent criminal cause.

Since 2005, we have helped hundreds of individuals affected by a homicide or tragedy, right across Quebec, and helped them receive moral, psychological and legal support after the tragedy, so that they can cope with their loss and resume the course of their life.

The AFPAD wishes to thank the Standing Committee on Legal and Constitutional Affairs for the opportunity to submit our point of view. Making this presentation is very important to the AFPAD, to engage legislators about the fate of victims of crime so that they may in turn broaden the scope of this bill in the interest of victim safety, which is unfortunately severely weakened by the changes proposed therein.

Victims are often forgotten when legislative changes are made. It is not our intention to address all of the points today, but we want to draw your attention to two major points, the first being that we commend and approve the addition of the definition of "intimate partner" to section 2 of the Criminal Code of Canada.

Proposed subclauses 227(3) and 227(6), which amend section 515, introduce what we consider a major change by reversing the burden of proof in conditional release applications when an offender is charged with this type of offence. However, this provision applies only to a repeat offender previously convicted of an offence against an intimate partner. We are very concerned about the concept of a repeat offence, because many of our families have lost a loved one who was killed by an intimate partner, without this necessarily being a repeat offence. Violence between intimate partners is a tricky situation and is often kept quiet and overlooked, which should incite legislators to exercise greater caution toward potential victims and to take political and legal action. What is the opposite of protecting a life? An attacker's choice. This overly cautious interpretation involving repeat offences comes too late in the victim protection process. Those same victims are entitled to the protection established by the Canadian Victims Bill of Rights, so they must claim it. The concept of a repeat offender must be removed to achieve the worthy goal of protecting victims.

The second point that seems important to us is the bill's intent to modernize practices and procedures with regard to interim release. Bill C-75 proposes several changes aimed at modernizing practices and procedures around interim release. The bill reorganizes several provisions and modifies certain procedures to facilitate the quick release of persons charged under the least restrictive conditions according to the circumstances. We do not agree with these principles, which jeopardize the protection of victims. Can you name a single defendant or accused who would admit to the judge that they do not intend to comply with the conditions, however restrictive they are?

The will to reduce delays and administer justice as expeditiously as possible imperils the protection of victims. We are disappointed to see that legislators failed to take the opportunity to protect victims. It seems that the right of the alleged aggressors overrides the protection and safeguarding of a life and the rights granted by the Canadian Victims Bill of Rights. How do you intend to protect these vulnerable victims who are further exposed by this concept of quick release under the least possible constraints? I am worried today, because these victims, unfortunately, did not get a second chance.

● (1920)

Mr. Bruno Serre: I am going to continue on the same topic.

My name is Bruno Serre. I am the father of Brigitte Serre, who was murdered on January 25, 2006, at her workplace in Montreal at the age of 17.

I have worked in the Association des familles de personnes assassinées ou disparues for close to 10 years and I am a member of the board of directors. I am here on a volunteer basis in order to make you aware of the legislative void that exists when it comes to victims.

I have often appeared here on the Canadian Victims Bill of Rights and the changes to the law we wanted to see for victims. However, in this bill, I do not feel the influence of the Canadian Victims Bill of Rights.

How do you intend to protect all of these victims who are frightened and who denounce their aggressor, when these aggressors are quickly released again under the least strict and least constraining conditions, unless they are repeat offenders?

Please! Did Brigitte Serre, Daphné Huard-Boudreault, Cheryl Bau-Tremblay, Gabrielle Dufresne-Élie, Francine Bissonnette and all of the others get a second chance? No. They were all murdered, and by aggressors who were not repeat offenders.

I implore you to withdraw the concept of repeat offence and add more elements to protect the victims. The reversal of the burden of proof to obtain release should be systematic when there has been violence against a victim. Otherwise, how can you protect those victims? Perhaps you need to build them an ivory tower, or you will have missed your chance. Ask some of these terrorized victims what they think.

I can tell you that over the past 10 years, I have been around families that have lived through these tragedies. It isn't easy for them and they receive no assistance. They are scared, they are terrified. When you have crimes of passion like those, with violence, we are the ones who then support the families of these murdered victims.

We thank you for taking the time to listen to us. This has to change because we have to reverse the tendency that means that we see too many homicides that could have been avoided.

Thank you.

The Chair: Thank you. Thank you for the work that you do.

[*English*]

Now we're going to go back to the order on the agenda. I apologize for the diversion.

Ms. Basnicki, the floor is yours.

Ms. Maureen Basnicki (As an Individual): Good evening, and thank you for your invitation to discuss Bill C-75.

My name is Maureen Basnicki. I am the co-founder of the Canadian Coalition Against Terror. I'm also the founder of the Canadian National Day of Service Foundation.

Over the years, I've had the opportunity to address both House and Senate committees re many topics concerning terrorism, counter-terrorism initiatives, and advocating for victims of violent crime, which includes Canadians victimized by terrorists. I was one of the original recipients of the Queen's Diamond Jubilee Medal for my enduring dialogue on terrorism, and it is through this lens that I'm giving a brief today. I thank you for the opportunity to do so.

On September 11, 2001, my life changed forever when my husband Ken was murdered in the attacks on 9/11. He was a proud Canadian who worked from his home in Toronto. Ken was on his first trip to New York to network for his job. In the aftermath of the horrific attacks, I decided that I wanted to do something to ensure that no family has to go through what mine did, and I shared this with other victims.

I'm a very proud Canadian, as was my late husband Ken. Even though Ken was murdered outside our border, it is important for me to have my country send a proper message to the global community that my Canada will not tolerate anyone, either a Canadian citizen or a citizen from another country, deliberately trying to harm or murder innocent civilians. That is why I co-founded C-CAT, along with my friend and colleague, Danny Eisen. For those of you who are unaware, the Canadian Coalition Against Terror is a non-partisan policy research and advocacy body committed to seeking innovative legal and public policy strategies in the fight against terrorism.

In that context, I would like to speak to you about some of what is contained in this legislation that concerns me greatly.

The government has used the anodyne term "hybridization" to refer to more than a hundred changes they are making to sentencing provisions in the Criminal Code. However, it is clear that what is happening here is simply a reduction in sentences. I would particularly like to speak to clauses 16, 17, and 20 to 23. These are all provisions relating to terrorism.

Currently, providing property or services for terrorist purposes could be punished by up to 10 years in prison. Under this bill, the sentence could be as little as a fine. Currently, using or possessing property for terrorist purposes could be punishable by up to 10 years in prison. Under this bill, the sentence could be as little as a fine. Currently, participation in the activity of a terrorist group could be punishable by up to 10 years in prison. Under this bill, the sentence could be as little as a fine. Currently, participation in terrorist activities could be punishable by up to 10 years in prison. Under this bill, the sentence could be as little as a fine. Currently, leaving Canada to participate in a terrorist activity could be punishable by up to 10 years in prison. Under this bill, the sentence could be as little as a fine. Currently, advocating or promoting terrorism could be punishable by up to five years in prison. Under this bill, the sentence could be as little as a fine. Finally, harbouring a terrorist is currently punishable by up to 10 years in prison. Under this bill, the sentence could be as little as a fine.

The rationale provided by the government has been that there is a need to speed up the court system. On that point, I don't disagree. There are unconscionable delays in prosecuting criminals, and those delays have often led to criminals walking free on a technicality. However, one has to wonder if treating a terrorist in the same manner as someone who got a parking ticket is the best way to fix a broken system. I would say absolutely not. It sends the wrong message to victims and to Canadian society as a whole. It sends the wrong message to other countries and would-be terrorists, either home-grown or from outside our borders.

Terrorists, members of terrorist groups, and those who profit from them should face the full force of the law. I have to wonder, since this government is often very fond of consultation, what groups were asking for this. I can't imagine that any of the members of Parliament on this committee knocked on a single door where someone told them they were concerned the punishment for terrorists was simply too harsh.

● (1925)

I would recommend that this committee repeal all the provisions in this bill that lessen the penalties for terrorists. Unclogging the courts is certainly a noble objective, but there are many better ways to do this than have been attempted here. Victims have an important interest in the criminal justice system that is not delayed. Remedies that emphasize both the rights of the accused and the rights of the victims must be found.

I would like to close by stating Prime Minister Justin Trudeau's words when he was challenged by Canadians across the country with regard to the $10.5-million payout to satisfy the settlement regarding the violation of Omar Khadr's rights. He said:

> The measure of a society – a just society – is not whether we stand up for peoples' rights when it is easy or popular to do so, but whether we recognize rights when it is difficult, when it is unpopular.... We are a society that stands up for peoples' rights and when governments fail to respect peoples' rights, we all end up paying and that is the lesson hopefully future governments will draw from this settlement.

I'd like to remind you that it's the safety and security of citizens that is the primary responsibility of our Prime Minister. Ensuring that there are laws and penalties in place that send a strong message of condemnation and act as a deterrent are of vital importance to Canada. I'm a Canadian who has been victimized by terrorism. I join many other victims of violent crime to say that, in our opinion, changing sentencing to minimum time in the case of heinous crimes committed by terrorists, repeat offenders, drunk drivers, etc., lessens the rights of victims.

Justice and accountability are not obtainable for all victims. However, when our security forces do get the perpetrator, I hope that our judicial system delivers the proper sentence that is fair to both the offender and the victim. I want my rights as a Canadian who has been victimized. Please do not decimate our criminal laws. That will send the wrong message.

Thank you, and I'll be pleased to take questions later.

● (1930)

The Chair: Thank you.

Again, as I mentioned to Ms. Wiebe, I am so sorry for what you went through.

Professor Leuprecht, you're next.

[*Translation*]

Dr. Christian Leuprecht: Good evening, ladies and gentlemen.

I thank you for your invitation and for the privilege of testifying before the committee.

[*English*]

I have a couple of caveats. I'm no lawyer and I come at this strictly as a political scientist. I've also been asked to comment specifically on the issue of hybridization, so I shall limit my remarks to that particular remit.

[*Translation*]

I will be happy to answer your questions in both official languages.

[*English*]

The overall strategy, as far as I can tell, with regard to hybridization is to provide an incentive for people to plead out. If, on an indictment, you face a long sentence, you have not much of an incentive to plead. If, under a summary conviction, you face a much shorter sentence, you have a strong incentive to plead out. That incentive is reinforced by programs such as justice on track that provide a financial reward for Crowns to plead out on cases. The Crowns will be happy, because this will result in more money in their pocket, but I have some concerns here.

The first is that, ultimately, as I point out in my submission, the vast bulk of cases go through provincial court. A tiny number of cases go through superior court, so this bill risks unclogging the superior court system at the cost of the provincial court system. Of course, this also raises many of the potential maximums to two years less a day. It also risks reinforcing the number of people who find themselves in provincial systems where, by and large, they don't have access to the sort of programming they have in federal court. I'm not sure that having even fewer cases go through superior court than we already have is really going to be particularly effective in terms of the correctional system that we have in place.

Second, we already have people who deliberately drag out the court process because they take advantage of dead time. Dead time, which used to be credited at two for one, is now at the discretion of the judge. It can now be credited and is often credited at one and half for one. Now your incentive is to drag out the process as long as possible, because the longer you can drag it out, the less chance you have of ever doing any jail time under this new proposition if the offence is a summary conviction. It will reduce the number of people who will effectively do any jail time under their sentence.

Third, very few cases ever go to trial. I provide some of the data here. It is well upwards of 90% of cases that are cleared by other means than trial. To what extent is hybridization really going to achieve the objective of unclogging the court system?

Fourth, many offences are already hybridized. What is particularly interesting here is, of course, the long list of acts and violations that are not currently Criminal Code violations but other forms of violations. I point to one particularly curious matter, which is that the act lists the implications for every offence except for one, which is the exploitation and trafficking in persons, where the only reference is to another bill that is currently finding its way through Parliament.

The reason I pick out this particular example is that I am not sure to what extent the Canadian public will tolerate hybridization for sentences that currently have 10-year maximums. The reason is presumably to signal with these 10-year maximum sentences that these are serious offences. If we now hybridize these offences, the signal that we are sending is that these offences are no longer as serious as they were before. We will need to test that with public opinion.

Fifth, expanding the latitude for the Crowns has important procedural implications that I am not sure have been carefully contemplated. I list these implications, implications with regard to warrants, with regard to statutory limitation and charges, with regard to fingerprints, with regard to the right to elect a trial by judge and jury, and when you can apply for a pardon. We are talking about some fairly significant procedural changes here.

Sixth, a Crown or police presumably lay charges for a reason. The reason is that they believe there is a reasonable chance of obtaining a conviction. Shouldn't we let the justice system then take its course? Aren't we doing a disservice to the law enforcement agencies and to the Crown who believe there was merit in laying a charge to begin with? What is the point ultimately of having a justice system when our sole objective now becomes to resolve as many cases as possible before they ever go to trial?

Seventh, I have concerns about the implications for investigators that, by having fewer cases go to trial, it means that the few cases that come to trial are very serious cases that are going to be highly complex.

● (1935)

If we have fewer investigators with extensive experience being questioned by aggressive and very talented defence lawyers, I think there is a greater risk that these particularly complex and notorious cases will subsequently fail as a result of the inexperience of some of the law enforcement members who show up to provide testimony.

Eighth, this point has already been expanded upon in a much more articulate manner than I ever could by the families of victims present here. I suspect that even though we have a Canadian Victims Bill of Rights, this has already become rather a pro forma matter in consultation. It doesn't appear that the changes being proposed here will reassure their faith in the criminal justice system. They're probably likely to be somewhat unpopular with victims.

In sum, I would conclude that it appears hybridization puts the benefits of the judicial process before the interests of victims, investigators, prosecutors, provinces, the public, the integrity of the justice system, and the rule of law. I'm apprehensive about any legislative change that puts the merit of process before the merit of substance.

[*Translation*]

Thank you.

[*English*]

The Chair: Thank you very much.

Ms. Beazley.

Ms. Julia Beazley (Director, Public Policy, Evangelical Fellowship of Canada): Thank you, Mr. Chair and members of the committee, for the opportunity to participate in this study.

The Evangelical Fellowship of Canada is the national association of evangelical Christians in Canada. Our affiliates include 45 denominations, more than 65 ministry organizations and 35 post-secondary institutions. Established in 1964, EFC provides a national forum for Canada's four million evangelicals and a constructive voice for biblical principles in life and society.

Our approach to the issues we will address in Bill C-75 is based on biblical principles that teach respect for human life and dignity, care for the vulnerable, and freedom of religion, principles that are also reflected in Canadian law and policy.

Bill C-75 proposes a significant number of changes to the Criminal Code, including the hybridization of a number of Criminal Code offences. This would allow, as you know, some serious indictable offences to be treated as relatively minor summary offences at the discretion of the Crown. It's on this element of the bill that I have been asked to provide comments. Our concerns in this regard are limited to a few key areas.

Criminal laws give expression to the norms that undergird a society. They both express and reinforce the basic commitments that bind a society together. It is often said that the law is a teacher. Amendments to the Criminal Code can signal or imply a shift in our society's core principles or their interpretation, which is sometimes appropriate, but this also means we must carefully consider the implications of any changes we make.

The categorization of a criminal offence tends to indicate the seriousness of the conduct it addresses. Hybridization suggests that an offence can now be considered less of a violation of human dignity, less of a threat to society or social cohesion, and less harmful to the vulnerable among us. Respectfully, we submit that to hybridize some of the offences proposed in this bill would send the wrong message. We understand that one of the objectives of hybridization is to reduce delays in the criminal justice system, but to paraphrase what Mr. Geoff Cowper told this committee last week, our goal should be not to reduce delays but to deliver justice in a timely way that's responsive to the public interest, to the needs of the victim and to the community generally.

When Bill C-75 proposes a greater maximum penalty for repeated intimate partner violence—and I hear the concerns of my co-panellists about recidivism—this communicates that this is an offence the government considers to be very serious, that violence is unacceptable and is to be deterred with severe penalty. This is a good message.

Conversely, when the bill proposed to hybridize offences related to human trafficking, sexual exploitation, or the assault of religious officiants, it sends the message, whether intended or not, that these offences are of lesser concern. Bill C-75 proposes to hybridize subsection 176(1) of the Criminal Code, which deals with obstructing or violence to an officiating clergy. Obstructing or assaulting a religious official who is about to perform religious duties strikes directly at the heart of religious belief and practice. Religious officials are not merely acting as individuals when they're carrying out their religious duties; they are representatives of the broader community of faith.

Last year, more than 65 interfaith leaders wrote to the Minister of Justice expressing our deep concern with the repeal of the section 176 protections that were proposed in Bill C-51. We wrote, "The deliberate assault of a religious official outside a house of worship is a different kind of offence from other public disturbances, assaults, threats or incitement to hatred. An offence against a people at worship reverberates through the community and touches every member."

Offences against religious officials and people at worship are unique in character, in significance and in motivation, and in a climate of increasing incidence of hate, specifically at and against places of worship, we believe it's essential to maintain the focused protection that section 176 offers religious leaders. We are grateful that this committee heard the concerns of religious Canadians and recommended that section 176 not be repealed but instead be revised to be more inclusive of all religious officials. We ask the committee, in keeping with that same understanding and responsiveness to the concerns of religious Canadians, to recommend that this offence not be hybridized in Bill C-75.

You heard compelling testimony last night of the realities of human trafficking and all forms of sexual exploitation, and the devastating impact of these crimes on their victims. These crimes constitute a grave violation of human rights, including the rights of women and children to live free from violence, and it's essential that the gravity of these offences be consistently reflected in our laws and policies. We know and have known for years that in Canada it is mainly Canadian women and girls who are trafficked, and they're being trafficked into the commercial sex trade.

● (1940)

Ninety-five per cent of all cases in Canada in which trafficking charges have been laid in the last 12 years were domestic and primarily involved sexual exploitation. StatsCan's latest report says that 95% of trafficking victims are female, 72% are under the age of 25 and one in four victims is under the age of 18.

We're pleased that this government is taking action on human trafficking and is consulting on the development of the new national action plan. We're also eagerly awaiting this committee's report out of its study on human trafficking.

We're disappointed that Bill C-75 proposes to hybridize certain offences related to human trafficking and sexual exploitation. These other initiatives demonstrate that this government rightly considers these crimes to be worthy of significant legislative and policy focus, but the proposed hybridization of related offences seems to send a conflicting message.

In particular, we note the bill's hybridization of the following:

The first is section 210 on keeping a common bawdy house. This provision allows law enforcement to address the ownership and operation of brothels, which are often loosely disguised as spas, holistic centres or massage parlours, in which individuals are frequently held, exploited or trafficked. The naming and continued inclusion in the Criminal Code of such a place is significant, because the existence and operation of these places can legitimize the hold, power and influence of a pimp, trafficker or exploiter over the exploited.

As I was preparing for this, I spoke with a friend and colleague who has first-hand experiential knowledge of how these facilities operate. She explained that pimps and traffickers use places like holistic centres and massage parlours with the full knowledge of the owner, and that placing their girls in a licensed facility legitimizes the pimp or trafficker as part of a business. Individuals who use these places to exploit do so with intention, forethought and planning.

The exploitation that occurs in these facilities is rampant. We need access points to these places, and we need to be careful that we don't limit or restrict the ability of law enforcement to monitor, to search and to prosecute where needed.

Rather than repealing this section, as some have called for, or hybridizing it, as this bill does, we suggest the committee consider clarifying the definition of "bawdy house" in the Criminal Code. The current definition is imprecise, and that imprecision actually cloaks the exploitation that concerns us. We would support a definition which makes it clear that the offence targets situations of sexual exploitation where individuals are held, kept or exploited in a place where someone else is in control of their movement, their activity and quite often their finances.

Next are subsection 279.02(1), on material benefit with trafficking, and subsection 279.03(1), on withholding or destroying documents. These offences as they relate to the trafficking of a person under the age of 18 remain indictable. Our laws rightfully extend particular protections to children who are uniquely vulnerable in a number of ways.

However, this bill would hybridize these same offences as they relate to adult victims. This is problematic because exploited adults are quite often just exploited children who happen to turn 18. In fact, often the only thing about their circumstances that has changed is that they are now 18 and the severity of the abuse they have suffered or continue to suffer does not lessen when they turn 18.

Victims who become adults in the eyes of the law may already feel a bit left behind, because the system offers them fewer supports and services and treats the crimes committed against them as less serious. I would argue that even in cases where the exploitation begins or occurs when the victim is an adult, we do not want to send the message that this conduct is less serious. Human trafficking and the criminal offences associated with it must be considered very serious and be dealt with accordingly. As such, we recommend that these offences not be hybridized.

Finally, we have subsection 286.2(1), on material benefit from sexual services. This provision is clearly aimed at and I suspect applied almost exclusively to individuals who are benefiting, as the law says, from the sale of someone else's sexual services. It is clear that what the current laws aim to do is prevent the exploitation of one individual by another.

This offence and others covered by the Protection of Communities and Exploited Persons Act should not be hybridized. This act established an incredibly important shift in how our country addresses prostitution. It refocused our laws on the buyers and those who profit from exploitation while decriminalizing those who are selling or being sold. We believe these laws are a critical tool in the fight against trafficking and sexual exploitation because they seek to curb the demand for paid sexual services, which is what fuels sex trafficking and funnels women into prostitution.

● (1945)

The act has a mandatory five-year review built in. We strongly recommend that the government keep the current prostitution laws in place as they are, and that when that five-year mark is reached it conduct a thorough review of the laws and their effectiveness in order to determine how they may be strengthened or improved, with the clear objective of eliminating sexual exploitation.

Thank you.

The Chair: Thank you very much.

Thank you to all of the witnesses.

We'll now go to questions, and we'll begin with Mr. MacKenzie.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair.

Thank you to the panellists.

I'm really impressed. I'm just an old policeman. I'm not a lawyer. I haven't spent my life defending clients, but I have spent my life defending everyone, both sides of that equation. That's the only fair way a police officer can function.

Having said that, Ms. Wiebe and Mr. Serre, both of you indicated the real pain of going through the loss of a loved one at someone else's hand. Can you explain to us—I suspect you will—how the trial includes the sentencing and the incarceration, and what happens when people are released early from prison?

Ms. Wiebe, you can go first.

● (1950)

Ms. Karen Wiebe: The needs of homicide victims are very specific, I guess, more so than many crimes, because there is no coming back from a murder. When a person is murdered, they're gone. There's no way to fix it. There's no way to change it. There's no way to pay it back. That's why we need to look at the term "restorative justice", for example, because there's no restoring in a homicide.

The co-victims, the families and so on, of those who have lost their lives through the deliberate act of somebody else are often very angry. They are victimized initially by the crime, but they feel revictimized by the system. Then, when the system fails them by allowing somebody to achieve parole early or to plea bargain down to a lesser sentence that then carries a very small amount of time, they feel even more angry. Their anger is often then directed at the justice system.

There are many ways in which victims are revictimized through the process and there are many ways in which the offender's rights are valued greater than the victim's rights. Here's just one minor thing with regard to parole hearings, for example. When you go to a parole hearing as a victim, it's a shocking experience. I remember being in shock and not remembering a lot of what happened in that parole hearing, coming face to face with the killer of my son. At the end of it all, he gets a transcript of what went on in that parole hearing and I don't because I was there. Yet I don't remember it.

That's one small example of how people are revictimized over and over again. There are many, many more.

Perhaps I'll let the other person speak.

Mr. Dave MacKenzie: Thank you very much.

Mr. Serre.

[*Translation*]

Mr. Bruno Serre: I'd like to continue in the same vein.

When you are a victim, you don't have many rights. The first time you go to court before a judge, it's your first experience and you want it to be the last. No one is interested in going back. It's really a first, and you know nothing. You have no rights but you see that the accused, for his part, has all the rights. Even I was warned that that if I did not stop looking at and intimidating the accused, the judge would make me leave the court and I would no longer have the right to be present at the trial.

How does a victim feel when they are there? I saw a photo of a statue on Facebook with an empty centre. That is the victim. When you lose someone who is dear to you, you have this very large void at the centre of your being; your loved one is no longer there.

I can't explain to you the pain a victim goes through. I understand the other victims when I meet them, I know what they go through, it's visceral. No two victims are the same. Among all of those I met, no one experienced the tragedy in the same way; it's never the same. It's always something that has to be begun anew and explained. It's not the same pain; no one experiences this in the same way. The approach is always different.

Unfortunately, the victims are often poorly informed. They need to be better informed. A lot of importance is given to the accused and not much to the victims. It doesn't take much. We have to give information to the victims, take care of them and protect them.

Earlier I said that the victims of conjugal tragedies were never protected. If they denounce someone, they are the ones who will suffer because the accused will avenge themselves. They have no protection at all.

[*English*]

Mr. Dave MacKenzie: Thank you.

The Chair: You have one minute left.

Mr. Cooper.

Mr. Michael Cooper: You really have to wonder about this government's priorities. The government has taken more than a year to fill the victims ombudsman position. We have government MPs who voted against legislation to strengthen the independence of the victims ombudsman. As Ms. Basnicki pointed out, we have a government that enriched Omar Khadr with $10.5 million. Now this.

It is hybridizing offences, not the most serious imaginable but among the most serious in the Criminal Code, including terrorism-related offences, impaired driving-related offences, material benefit in the context of human trafficking, and for what? To download these cases onto provincial courts that are already overstretched and overburdened that will now have an 18-month rather than 30-month Jordan timeline, how does that make sense?

Whoever wishes can answer.

● (1955)

The Chair: That is more rhetorical than a question for the witnesses. We're past six and a half minutes, so if anybody wants to give a brief answer, they can.

Is there anybody who actually wants to answer that?

Dr. Christian Leuprecht: Look, I think it would be—

Sorry. Go ahead.

The Chair: Is there anybody who is answering?

Ms. Karen Wiebe: Yes. I can answer that.

This is a very large hole and a very difficult topic to discuss, because victims are in agony for as long as the rest of their lives. You have a trial that takes eight years, like the case I stated, where these parents were also witnesses, so they couldn't even attend the trial until after they had given testimony, so they didn't even know all the details of the trial.

In those situations where it is so elongated, it's ridiculous. With 18 months, or a much smaller length of time to try to deal with those cases, one wonders if that can cover everything. One wonders if justice can be served in that amount of time. Who's doing the work? Does it mean that if there's no preliminary hearing, the case is going to be handled as appropriately as possible?

Sorry, I'm getting an echo here and it's making it difficult to hear.

It's very difficult to give a certain length of time that all trials should take. Unloading onto provincial courts is not the answer, but I think both the federal and the provincial justice systems need to work together to make sure there isn't an eight-year trial process, but that there is a process that is appropriate to what is needed for those cases so justice can be served for everybody involved.

The Chair: Thank you.

Mr. Boissonnault.

[*Translation*]

Mr. Randy Boissonnault: Thank you, Mr. Chair.

I want to thank all of the witnesses who came here tonight.

I am going to speak to Ms. Roy, and then I will yield the last minute of my speaking time to Mr. Virani.

Ms. Roy, did you see that the definition of "intimate partner" was added to paragraph 1(3) of the bill, and that this amends section 2 of the Criminal Code? Are you pleased with that addition?

Ms. Nancy Roy: Of course, and that is what we came to tell you today. We are pleased with that addition, but unfortunately we are less enthusiastic about the recidivism aspect.

Mr. Randy Boissonnault: Yes, that was very clear.

Ms. Nancy Roy: I don't know what happens elsewhere in Canada, but in Quebec unfortunately, from week to week, there is an epidemic of young women who are being killed, and not necessarily by repeat offenders. That is why we are asking you today to courageously represent the victims. We have a bill of rights, and if I can...

Mr. Randy Boissonnault: I have to interrupt you here, because I have three other questions to ask and I have five and a half minutes left.

Is the expression "*partenaire amoureux*" being used in the French version equivalent to the English term "dating partner"? If they are not, why not?

Ms. Nancy Roy: I am not a translation expert.

Mr. Randy Boissonnault: You don't have to be. Just tell us what it means to you.

Ms. Nancy Roy: To us, it encompassed the definition or the issue, but we had a problem with the repeat offender aspect. That does not represent reality. That is why we would like to see that withdrawn.

Mr. Randy Boissonnault: On that matter, you commended the reversal of the burden of proof. The document you submitted makes that clear. Your reservations are strictly about the recidivism aspect.

Can you explain why you have reservations about that?

● (2000)

Ms. Nancy Roy: In our opinion, the reversal of the burden of proof would protect the victims. It is almost equivalent to what we were asking for in the beginning, which was preventive arrest, which would calm down the aggressors.

If you reverse the burden of proof, all of the attention is focused not on the victim but on the aggressor. It's up to him to prove that he is not dangerous. In that way we provide more protection for the victims, and that is very important to us. It's major. This is almost equivalent to preventive arrest. That is what we wanted, but it would never have been deemed constitutional.

Mr. Randy Boissonnault: I started speaking too quickly. I wanted first to thank you for your work. I lost my sister Lisa when I was 27. She was seven years younger than me. Even 30 years later science can't tell us why Lisa died. I had no one to be angry at, and I couldn't take legal action. I can't imagine the burden victims' families carry. And so I commend you for your work. I am also speaking to you, Mr. Serre, and I admire everything you have done for the community.

We have a very delicate question that concerns preliminary inquiries. During our study on human trafficking, we heard that most often, a person who left the human trafficking network and wanted to take legal action had to testify at preliminary inquiries, not just once, but two, three or even four times, and that this always had the effect of victimizing that person or the witnesses.

Does that compare to your experience and to that of the victims your work with?

Mr. Bruno Serre: I can answer that. It is indeed very difficult for the victims to go through several trials or several preliminary inquiries. If after one trial you have to go through another two years later—or another preliminary inquiry—you relive all of your loss and grief. You go through the same states, the same distress. It's like the movie *Groundhog Day*. It's exactly the same thing. The victims feel that, and hope that there won't be multiple trials. It's always preferable that there be as few as possible.

Mr. Randy Boissonnault: In your opinion Ms. Roy, would eliminating preliminary inquiries give victims greater protection? Is that correct?

Ms. Nancy Roy: Yes, we think so. When the victims go through a judicial process, they are often disheartened about coming back to testify or from continuing to do so. We have to protect them as much as possible, and see to it that they are not vulnerable when they come to testify.

Mr. Randy Boissonnault: I thank both of you. This was very good of you.

[*English*]

Ms. Beazley, section 75, the repeal of the bawdy house laws, your clarification suggestion, in your opinion that clarification would still permit the gay men who were arrested in the bawdy house and bath house raids from the 1980s to the 2000s to have those records expunged.

If that could be clarified, then we could then do what we need to do with that other piece of legislation. Your recommendation wouldn't stop that from taking place. That was not your intention. Is that correct?

Ms. Julia Beazley: That was certainly not our intention. As I said, our interest in that provision is that it enables us to look at places where individuals are held and exploited, quite often trafficked. The definition is really quite vague. We can accomplish a lot by bringing some precision to that definition, and making it very clear what it is we're addressing, what we're after.

Mr. Randy Boissonnault: Thank you very much.

I have one minute for Mr. Virani.

The Chair: We'll go to Mr. Virani, hopefully for the next round of questions. Perhaps Mr. McKinnon will let him have the first part of the next round.

Mr. Rankin.

Mr. Murray Rankin: Thank you, Chair.

Thank you to all the witnesses.

Professor Leuprecht, you were good enough to list your unintended consequences one by one. There were eight, I think.

I'd like to start with the one that caught my attention and that is the issue of hybridization, taking a backlog in the superior courts and visiting that on the provincial courts. It sounds to me a lot like downloading by the federal government.

I thought your statistics about how we have 99.6% of criminal cases already going through the provincial courts was very sobering. The implications of hybridization, I think I understood you to say, would be that even fewer cases go through the superior court, all of which would lead to enormous additional expenses for the provinces.

In the research you've done, is there any empirical evidence on how much the additional cost would be?

● (2005)

Dr. Christian Leuprecht: I've done an entire book on the Canadian Constitution and issues arising from it. I'm also a scholar of federalism and an associate of the best-known institute in the country that deals with issues of federalism and intergovernmental relations.

All that is to say that I speak with some background on this about concerns about, on the one hand, implicit downloading by federal governments, not just in Canada but elsewhere, at the expense of other jurisdictions that share in the sovereignty of Canada and the consequences incurred for those jurisdictions, which also, let's remember, have a very different capacity to deal with it. A province like P.E.I. has a very different capacity to deal with an increase in cases than a province such as Quebec or Ontario has.

I'm happy to try to come back to the committee and see what research I can dig up on the actual costing. If I were a provincial premier, I would not want to have any of this without adequate compensation and the costing from the federal government of the additional overall costs incurred by these measures.

Mr. Murray Rankin: You're absolutely right. I've talked to attorneys general who have already told us they're absolutely flabbergasted that the federal government would, in the name of delays in the superior courts, Jordan, which is what allegedly caused this 302-page bill to be before us, that the implications of what they're doing is simply to download the expense and the additional burden on already overburdened provincial courts. As you say, 99% plus of criminal cases already occur there. So the implications are not lost on the attorneys general.

I thought that was a very helpful point that you made.

Dr. Christian Leuprecht: They're not my numbers. They are Statistics Canada numbers that are submitted as an addendum to my brief.

Mr. Murray Rankin: Absolutely. I thank you for bringing that reality to our attention here.

The other thing I wanted to ask you was about number six of your eight points. To refresh your memory, that was the one about the charging provisions in British Columbia, New Brunswick and Quebec.

We've heard other witnesses already tell the committee that we have a charge approval process that the Crowns are required to do. That has led to many fewer trials because the Crown has to be satisfied that there is "a substantial likelihood of conviction". Routinely, Crowns say there isn't, and cases don't proceed.

In itself that would be one of the best ways, I suggest. Others at least have suggested, and I put to you for your comment, to deal with the clogging up of our courts, if there was a check between the police and the courtroom. Do you have any comments on that? Number six says:

> Usually Crown or police (depending on the province) lay charges only when they believe there to be a reasonable chance of obtaining a conviction. Presumably, the justice system should then take its course. What is the point of having a justice system when the state's overarching objective becomes to resolve as many cases as possible before they ever go to trial?

I'm saying it's not a reasonable chance of obtaining a conviction; it has to meet the standard that there's a substantial likelihood of conviction. If we went to that higher standard, don't you think that would have an impact on generating less business for the courts of the land?

Dr. Christian Leuprecht: As you know, and your own legal experience in this field testifies to that, we already have different types of standards when it comes to warrants, for instance, so introducing these types of standards would make good sense. It also is in line with the practice with which complex cases are increasingly prosecuted, including by the Public Prosecution Service of Canada, where we now have Crowns who are actually embedded with investigations and guiding investigations so we can actually take good direction and instruction from Crowns, not simply when police are done with investigations but throughout the course of the investigation, to ensure that we can, by the end of the investigation, actually meet the standard that you propose.

● (2010)

The Chair: Okay, Mr. Virani, you were going to get a minute. I'm assuming Mr. McKinnon will give you his first minute to make sure you can get your one minute.

Mr. Arif Virani (Parkdale—High Park, Lib.): It's a question and it's prefaced by a comment.

Mr. Cooper and one of the witnesses, Ms. Basnicki, raised the Khadr matter and Mr. Cooper asked rhetorically, what the priorities of the government are. He said they seem to be a bit skewed and it makes one openly question the priorities of the government.

What I would say to that is simply that the priorities are in defending the Charter of Rights and Freedoms and standing by the charter, and that when the government is complicit in the torture and violation of an individual, the government should take responsibility for that complicit behaviour. It is important not to conflate either in this committee or in front of these witnesses the difference between terrorism that occurred in Afghanistan and torture that this government was complicit with in Guantanamo. After two consecutive defeats in the Supreme Court of Canada on this very issue, when Mr. Cooper's party ostensibly believes in reducing court backlog and courtroom delay, it really begs the logical question as to why one would return to the courts, which we all seem to agree are clogged, with yet another likely failed charter claim.

Apropos that, Ms. Basnicki, if we can agree that addressing court backlogs is an important imperative of this bill, is settlement of cases a way of reducing court backlog?

Ms. Maureen Basnicki: I'd like to respond that the charter as it stands does not define victims' rights. I worked on the Victims Bill of Rights and I'm only asking that my rights be regarded as Mr. Khadr's are regarded. I am not here to take away from Khadr's rights; I'm only suggesting that as a victim, I should have rights too.

Mr. Khadr was a self-confessed terrorist, not in an act in...perhaps the venue was Afghanistan. He was convicted and self-confessed in the U.S. I am a Canadian citizen. He committed his crime—it was not alleged; he was convicted—outside our country. I'm only asking as a Canadian citizen, as he is, that I have rights too and it would appear there is no balance in this as it stands right now.

He belonged to the very organization, al Qaeda, that was complicit in the murder of my husband. You can only imagine how I feel when I see my government give him $10.5 million for a violation of rights and I am at the same time begging my country to afford me rights as a victim and a Canadian citizen who was married to a Canadian who lived in Canada.

Mr. Arif Virani: I'll pass that over to Ron. I just want to make sure that the record reflects that Mr. Khadr is also a Canadian citizen, Ms. Basnicki. But your point is well taken.

Ms. Maureen Basnicki: Yes, I pointed that out. I'd like to remind you that I'm a Canadian citizen. Thank you.

Mr. Arif Virani: Thank you.

The Chair: Mr. McKinnon, you have three minutes.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): I'd like to—

The Chair: Guys. You're out of order. Stop it. We have a little bit of decorum at this committee. I appreciate the passion on both sides, but we heard from the witness. She defended herself very well. I don't think we need your adding in.

Mr. McKinnon.

Mr. Ron McKinnon: Thank you, Chair.

I'd like to address my question, at least initially, to Ms. Wiebe.

You spoke to us about the eight-year trial and made a statement that you'd like to see all the levels of government get together and determine what is appropriate for what is needed. My perspective on the evidence I've heard on this committee is that's really the point of the hybrid offences. They still maintain their maximum, so if there is any deterrent effect, they still have that same effect but it allows the prosecution the discretion to, in a particular case, decide what is the best way to proceed to prosecute. In some cases, they will choose a summary offence as opposed to an indictable offence because that seems to be the best way forward for justice to happen, and also it means that sometimes they will proceed with the specific offence rather than charging a different offence that might be more amenable to prosecution.

I'd like your comments on that, and I would invite everyone else to follow.

● (2015)

Ms. Karen Wiebe: I hear many questions in your question. I don't hear just one of them.

Let's deal first of all with the preliminary hearing, the preliminary trial and whether that is something that can have both levels of government working on it. Provincial court—

Mr. Ron McKinnon: Excuse me. I'm sorry, but I only have a certain amount of time.

I wasn't talking about preliminary hearings. I was talking about hybrid offences. The testimony that I've heard is that they facilitate justice by allowing the prosecution to choose a more appropriate manner of prosecution, depending on the circumstance, allowing them to proceed with a specific offence, be it a terrorism offence or whatever, rather than charging something else, which they feel is more likely to achieve a conviction.

If you could, I would like you to address the hybrid offences question.

Ms. Karen Wiebe: I think that the Crown attorneys already have the right to decide what types of charges are going to be laid. In my experience in Manitoba, when a person is arrested for a crime, the police department brings the evidence to the Crown attorney, and the Crown attorney examines the evidence. My assumption, maybe incorrectly, is that the Crown attorney looks at what offences have contravened what laws we have. That's what they base their decision on what charges are to be laid. That has been my experience.

Maybe I'm not the best person to speak to this in terms of what you're asking, because my understanding is that they lay the charges according to the laws that have been broken.

Mr. Ron McKinnon: Fair enough.

The Chair: Mr. Leuprecht wanted to say something on that issue.

Dr. Christian Leuprecht: I have a 20-second intervention here.

As I've stated in several fora in recent days, one of the issues with gun violence is that this is a multivariate problem, precisely because we've reintroduced discretion into a process that previously had a mandatory 10-year minimum sentence. There's good evidence both in Canada and abroad from the data, not my point of view, but from the research that we have, that mandatory minimum sentences impose a serious deterrent on this type of violence.

There is evidence that there might be situations where discretion is probably not the best way to achieve the outcomes for public safety that we're looking for.

Mr. Ron McKinnon: We're not talking about mandatory minimums here. We're talking about maximum sentences.

These hybridized offences have a maximum sentence, but the act of hybridizing them allows the prosecution to choose a summary route rather than an indictable route.

Dr. Christian Leuprecht: Right, but if you as a criminal know that you might end up with a choice in how you're going to be prosecuted—there might be various reasons—I think that particular element of the law would serve as less of a deterrent than when you know there's no choice and you face a particular potential maximum penalty.

Mr. Ron McKinnon: The defendant does not have a choice. It's a choice of the prosecution.

Dr. Christian Leuprecht: Right, but the offender realizes that the prosecution has that choice. That, I think, has an impact on the incentive structure that offenders use, and we do have research to that effect.

The Chair: Okay.

Ms. Karen Wiebe: If I may....

The Chair: We're out of time on Mr. McKinnon's round, but if you have something short to add, Ms. Wiebe, go ahead.

Ms. Karen Wiebe: I would just like to add that I'm talking about homicide. There isn't a lot of leeway with homicide. It isn't like a lot of the other offences. When somebody kills somebody, it's going to be a homicide charge.

The Chair: That's understood completely.

I hope my colleagues will permit me one short question.

Ms. Basnicki and Ms. Beazley, in the event this committee decides that hybridization in some form is a good thing, not a bad thing, and decides to leave in the hybridization provisions, am I correct in reflecting that your testimony is saying that, even if some elements are hybridized, there are certain offences, for different reasons, whether moral, philosophical or because the crimes are so heinous in terms of perception, that we should be looking carefully at the list and carving those out, such as terrorism-related offences or, as in your case, offences against religious officials?

Is that what you're basically recommending? I think it is.

● (2020)

Ms. Maureen Basnicki: Absolutely.

Ms. Julia Beazley: I combed through the very lengthy bill. There probably are a number of offences that are perfectly fine to hybridize, but there are some where it is just inappropriate, and it sends a very, very negative message.

The Chair: Thank you. I appreciate that.

Ms. Maureen Basnicki: I would like to remind the committee that the decisions they make are not just for Canada, they're a statement in the global community. There are some crimes such as terrorism that have to be recognized. It goes beyond our borders.

I'd like to set an example in Canada and be proud of my country.

The Chair: I understand completely.

Thank you so much to the members of the panel.

[*Translation*]

Thank you very much. I appreciated your testimony greatly.

[*English*]

I really appreciate it, Ms. Wiebe. Thank you for joining us by video conference.

The meeting is adjourned.

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